

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



BRIEF FOR APPELLANT

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IN THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 18,861

JAMES M. X. DYKES,  
APPELLANT

v.

UNITED STATES OF AMERICA,  
APPELLEE

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APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals  
for the District of Columbia Circuit

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No. 18,861

## QUESTIONS PRESENTED

Appellant Dykes was convicted with three co-defendants of murder, robbery, and car theft, after a joint trial. Alleged confessions of all three co-defendants, which named Dykes 84 times and referred to him by pronouns 141 times, were introduced at the joint trial. Dykes' name was not deleted when the confessions were presented to the jury. The evidence against Dykes, apart from the confessions, was weak. All three co-defendants testified that they did not confess and that they were coerced. The judge did not rule that the confessions were voluntary before he submitted them to the jury. His instructions to the jury explained and justified the inadmissibility of involuntary confessions solely on the ground of untrustworthiness. Despite the three co-defendants' testimony to the contrary, he also told the jury that the confessions were made and signed by the three co-defendants. After conviction, the judge sentenced Dykes and two of the three co-defendants to 13 to 39 years. The third co-defendant was sentenced to 15 to 45 years. A fourth co-defendant, who was named in only one of the three confessions, was acquitted.

Dykes and the three convicted co-defendants appealed to this Court. This Court ruled that the confessions of two of the three co-defendants were inadmissible under Mallory. These were the two confessions in which the fourth co-defendant, who was acquitted, was not named. The convictions of the two co-defendants who gave the inadmissible confessions were reversed. These were the two co-defendants who received the same sentence as Dykes. Dykes' conviction was affirmed. This Court ruled that the District Court did not improperly deny Dykes a separate trial, although it said that Dykes' contention to the contrary raised a substantial question. Thereafter the two co-defendants whose convictions were reversed pleaded guilty to car theft and the murder and robbery charges against them were dismissed. They were sentenced to 8 months to 2 years imprisonment. A year later this Court, sitting en banc, ruled that a defendant is entitled to a new trial if in a joint trial with a co-defendant the jury hears the inadmissible confession of the co-defendant linking the defendant to the crime. Jones, Short and Jones v. United States. The decision of this Court in Dykes' case appears to be the only case holding to the contrary. At about the same time, the Supreme Court ruled in a habeas corpus case that the Constitution requires that the trial

judge must rule that an allegedly coerced confession is voluntary before he submits it to the jury. Jackson v. Denno. Furthermore, a series of <sup>recent</sup> decisions in this Court and the Supreme Court showed that the alleged confessions of the three co-defendants were taken contrary to their constitutional right to counsel. This appeal is from a judgment of the District Court denying collateral relief to Dykes.

In the opinion of the appellant, the following questions are presented:

1. Do the circumstances set forth above show that appellant was denied the substance of a fair trial and, if they do, is he entitled to vacation of the judgment and sentence against him pursuant to 28 U.S.C. §2255?

2. If appellant is not entitled to vacation of the judgment and sentence pursuant to §2255, does the District Court have discretionary jurisdiction, pursuant to coram nobis, to vacate Dykes' sentence and to resentence him, in light of the extraordinary events that have occurred since sentence was first imposed, including (a) the acquittal of the co-defendants whose inadmissible confessions naming Dykes were introduced at the joint trial and to whom the District Court gave the same sentence

as it gave to Dykes, and (b) the issuance of decisions of this Court and the Supreme Court which establish that Dykes was unjustly convicted?

3. If the District Court is without jurisdiction to grant Dykes relief pursuant to §2255 or coram nobis, should this Court, on the basis of the record and of the extraordinary circumstances which have occurred since Dykes' conviction was affirmed, recall its judgment affirming Dykes' conviction, reverse the judgment of conviction and remand to the District Court for a new trial?

Appellant submits that these questions should be answered in the affirmative.

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## Argument:

- I. Appellant was overwhelmingly prejudiced and unfairly convicted by the admission into evidence at his joint trial with four co-defendants of the confessions of two of the co-defendants, which under both Mallory and the Constitution were improperly taken and improperly admitted into evidence, and which, together with the confession of a third co-defendant, were submitted to the jury by a procedure and with instructions which were also unconstitutional. The substantiality of the unfairness and prejudice is highlighted by the ultimate acquittal of the two co-defendants who gave the two inadmissible confessions and of the fourth co-defendant, who like Dykes, did not confess but who, unlike Dykes, was not named in the inadmissible confessions.
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## Argument: Continued

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,861

JAMES M. X. DYKES,  
Appellant

v.

UNITED STATES OF AMERICA,  
Appellee

---

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

---

BRIEF FOR APPELLANT

Jurisdictional Statement

In 1961, appellant was convicted of felony murder, robbery, and unauthorized use of a motor vehicle. This Court affirmed the conviction. Dykes v. United States, 114 U.S. App. D.C. 189, 313 F. 2d 580 (December 20, 1962). Simultaneously with its affirmance of the conviction of this appellant, the

for the same crimes  
Court reversed the convictions/of two persons, Coleman and  
Tatum, who had been tried jointly with appellant. Coleman  
v. United States, 114 U.S. App. D.C. 185, 313 F. 2d 576;  
Tatum v. United States, 114 U.S. App. D.C. 188, 313 F. 2d 579.  
Certiorari was sought to review the affirmance of appellant's  
conviction. The writ was denied. 374 U.S. 837. After their  
convictions were reversed by this Court, the government dropped  
the murder and robbery charges against Coleman and Tatum. They  
pleaded guilty to unauthorized use of a vehicle and were  
sentenced to 8 months to 2 years imprisonment. Cr. No. 125-61.

The present case was initiated in the District Court by  
counsel who had represented appellant on the prior appeal. As  
originally conceived, the relief sought was a reduction in  
sentence to eliminate disparity in the treatment of appellant  
arising from the reversal of the convictions of appellant's co-  
defendants. The validity of appellant's trial and sentence was  
not attacked. Accordingly, relief was sought by motion for a  
writ of error coram nobis. The motion was filed July 1, 1964.

While the petition was pending and before it was argued  
in the District Court, this Court rendered its decision in Jones,  
Short and Jones v. United States (Nos. 17,688-92, July 13, 1964).

The decision announced a rule of law in conflict with the original affirmance of Dykes' conviction. At argument before the trial judge, Jones, Short and Jones was cited, and the Court was requested to treat the motion for writ of error coram nobis alternatively as though it had been brought under 28 U.S.C. §2255, if that appeared to the Court to be the correct procedure. This the judge refused to do. Transcript of proceedings of July 24, 1964, in the District Court in Criminal No. 125-61, pp. 6-18. At the conclusion of argument, the trial judge ruled that he lacked jurisdiction under the coram nobis procedure to grant the relief requested on behalf of appellant. Transcript, supra, p. 24. This appeal followed. This Court has jurisdiction under both 28 U.S.C. §1291 and 28 U.S.C. §2255.

STATEMENT OF THE CASE

This case has had a long history. Briefly it is as follows: \*/ On February 21, 1961, appellant Dykes was indicted with four co-defendants, Jackson, Coleman, Tatum, and Washington, for felony-murder, robbery and unauthorized use of a vehicle. 22 D.C. Code §§2401, 2901, and 2204. The five defendants were charged with stealing a car on the evening of December 23, 1960, and thereafter on the same evening robbing Fannie and Victor Schery on Sheriff Road, N.E., in the course of which robbery Victor Schery was shot and killed. Prior to trial, Dykes and Washington sought severance which was denied. Joint trial of all five defendants before a jury occurred in the fall of 1961.

Written post-arrest confessions alleged to have been taken by the police from Jackson, Coleman, and Tatum, but not from Dykes or Washington, were introduced into evidence at the trial. (Tr. 1583-1609). The defendants objected to the introduction of these confessions on many grounds, including coercion, Mallory, inadequate warning as to

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\*/ Transcript references are references to the trial transcript which is part of the record on this appeal.

constitutional and statutory rights, and prejudice to co-defendants named in the statements. (Tr. 1279-1376). The confessions described the theft of the automobile, the robbery and the shooting at great length and in detail. All three confessions named Dykes, as well as Coleman, Jackson and Tatum, as participants in the theft of the automobile and the robbery-shooting. Only Jackson's confession named Washington as a participant in the crimes. (Tr. 1600-1609). Coleman's and Tatum's confessions did not name Washington at all. (Tr. 1583-1600). The references to other defendants contained in each confession were not deleted when the confessions were read to the jury. The actual names of each of the defendants were read. Washington's counsel objected "strenuously" to Dykes' counsel's request that the names of co-defendants be masked or deleted when the confessions were read. (Tr. 1432-1433). He said:

"[Washington is named] in one statement, [Jackson's], but I want it before the jury that he isn't named in the other two [Coleman's and Tatum's]. Tr. 1433, 1439.

Washington's counsel did not join the objection by counsel for all other defendants to the names of co-defendants mentioned in the confessions being read to the jury.

Tr. 1441. \*/ He also pointed out to the jury the omission of Washington's name from two of the three confessions in his summation at the close of the trial. Tr. 1923. Dykes was named, and his name was read to the jury, 25 times in Coleman's confession and 29 times in Tatum's confession. Moreover, the pronouns "he, his, him" (referring to Dykes), and "we, us, they" (referring to Dykes and other defendants) were used, and read to the jury, 44 times in Coleman's confession and 35 times in Tatum's confession. Tr. 1583-1600. Coleman's and Tatum's confessions were both ruled inadmissible by this Court on appeal. See infra.

Just before the written confessions were introduced into evidence, the judge charged the jury that they were admissible only against the alleged maker. Tr. 1581-1582.

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\*/ See also Tr. Vol. 10: Police Officer Wilson (Tr. 1473): "Coleman admitted his part and implicated others." Counsel for Washington (Tr. 1478-A): "[H]e did not implicate James Washington, did he?" Wilson (Tr. 1479): "Not in my presence, sir."

The previous day, however, several police officers had testified to the oral statements allegedly given by Jackson, Coleman and Tatum before or at the the time the statements were reduced to writing. Tr. 1397-1399, 1404-1406, 1455-1457, 1482-1484, 1529-1531, 1539-1541, 1545-1548. One of the police officers did not mention the names of the co-defendants named in the oral statements, Tr. 1397-1399, 1404-1406, but three of them did. Tr. 1455-1457, 1482-1484, 1529-1531, 1539-1541, 1545-1548. No limiting instruction was given on that day. When later the judge did give the jury the limiting charge (before the written statements were introduced, Tr. 1581-1582, later on, Tr. 1813, and at the close of the trial, Tr. 1995-1996), he did not inform the jury that the instructions applied to the oral as well as the written statements. Dykes' counsel specifically requested that he do so. Tr. 1582-1583, 1616-1618. In testimony to the jury as to Coleman's and Tatum's oral statements, Dykes was named 30 times, and he was referred to by pronouns 62 times. Tr. 1455-1457, 1529-1531, 1539-1541. These statements were also held inadmissible by this Court.

Coleman, Tatum, and Jackson each testified, in and out of the presence of the jury, that their confessions were coerced by beating and threats. Each denied that he made the statements introduced against him. Tr. 1658-1661, 1678-1686; Tr. 1730-1739, 1748-1761; Tr. 1787-1791, 1797-1821 (jury present); Tr. 1162-1167, 1179-1183, 1207-1212, 1216-1222, 1240-1252 (jury not present). Three witnesses corroborated Tatum's testimony that he was beaten. Tr. 1775-1783, 1225-1235.

The police denied coercion. They testified that Coleman and Jackson were advised after their arrest that they were suspect, that they didn't have to make a statement, and that any statement they did make could be used against them. They were also asked if they wanted to make statements. Tr. 847, 866, 888, 980, 1033-1035, 1076-1077, 1097, 1131. The police testified to the same effect as to what they told Tatum after his arrest, except that they did not testify that they told him he did not have to make a statement. Tr. 842, 848, 870. There was no testimony that the police advised any of the three of their rights respecting counsel. The warnings at the heads

of the three written statements allegedly given by Jackson, Coleman, and Tatum read as follows:

Jackson: "Leon Jackson, you are being held on account of the death of Victor Schery. . . . I now ask you if you want to make a complete statement, telling what knowledge you have of this shooting, so that it can be taken down in typewritten form. Before making such a statement, I advise you that your statement must be made freely and voluntarily; also that your statement will be used in court at your trial if it becomes necessary. After hearing what I have just told you, do you want to make a complete statement? Answer: Yes, sir." (Tr. 1601).

Coleman: "Charles Stanley Coleman, you are being held on account of the death of Victor Schery . . . . I now ask you if you want to make a complete statement concerning this shooting so that it may be taken down in typewritten form. First, I wish to say that anything that you say in this statement can be used against you at your trial if it becomes necessary. After I have told you this, do you want to make a complete statement about the shooting? Answer: Yes, sir." (Tr. 1583-1584).

Tatum: "Now, Carl Anthony Tatum, you are being held on account of the death of Victor Schery. . . . I now ask you if you want to make a complete statement concerning this shooting so that it may be taken down in typewritten form. First, I wish to say that anything you say in this statement can be used against you at your trial, if it becomes necessary. After I have told you this, do you want to make a complete statement about this shooting? Answer: Yes, sir." (Tr. 1592-1593).

The judge gave the confessions to the jury without making a specific finding that they were voluntary. He found only that they were not involuntary as a matter of law. Tr. 1292-1295, 1368-1369. His instructions to the jury about involuntariness explained and justified the inadmissibility of involuntary confessions solely on the basis of their untrustworthiness. Tr. 1992-1994. Also, the judge told the jury:

"These statements were made and signed by the defendants while in the custody of the police." Tr. 1992.

The jury convicted Dykes, Jackson, Coleman and Tatum of second degree murder, robbery, and unauthorized use of a vehicle. It acquitted Washington of murder and robbery and convicted him of unauthorized use of a vehicle. The trial judge granted Washington's motion for judgment n.o.v. and acquitted him of the car theft. He sentenced Dykes, Coleman, and Tatum to terms of 8 to 24 years on count one of the indictment (murder), 4 to 12 years on count 2 (robbery), and 1 to 3 years on count 3 (unauthorized use), the sentences to run consecutively. (The sentences totaled 13 to 39 years). Jackson received consecutive sentences of 10 to 30 years, 4 to 12 years, and 1 to 3 years. (15 to 45 years).

All four convicted defendants appealed their convictions. On December 20, 1962, this Court issued its decision in all four appeals. Jackson, Coleman, Tatum, Dykes v. United States, 114 U.S. App. D.C. 181, 185, 188, 189, 313 F. 2d 572, 576, 579, 580. Coleman's and Tatum's convictions were reversed on the ground that their confessions were taken by the police during a period of unnecessary delay between arrest and presentment before a magistrate. Jackson's and Dykes' convictions were affirmed. As to Dykes, the Court said:

"His contention that the District Court erred to his prejudice in denying a severance raises a substantial question ....That the admissions of other defendants implicated appellant Dykes as well does not compel severance. . . . The court duly charged the jury not to consider any defendant's statements made in the absence of other defendants as evidence against the others." (Emphasis supplied).

The Court also rejected Dykes' argument that the evidence against him was insufficient.

Thereafter Dykes filed pro se a petition for rehearing en banc. This was denied. His counsel appointed by the Court to present his appeal (present counsel) then petitioned the Supreme Court for certiorari. Certiorari was denied. 374 U.S. 837 (June 17, 1963).

On May 1, 1963, Coleman and Tatum, whose cases had been remanded to the District Court for a new trial, pleaded guilty to unauthorized use of a vehicle. On May 31, 1963, each was sentenced to 8 months to 2 years imprisonment. The murder and robbery counts outstanding against them were dismissed. On July 22, 1963, the trial judge denied Dykes' pro se motion for a reduction of sentence dated July 17, 1963.

On September 30, 1963, Dykes moved the District Court pro se for vacation of his sentence pursuant to 28 U.S.C. §2255. The District Court denied the motion on January 2, 1964, and granted an appeal on January 17, 1964. Dykes moved this Court for appointment of counsel. On March 12, 1964, this Court denied the motion for appointment of counsel and dismissed the appeal "as frivolous." No. 18,449.

On July 1, 1964, present counsel, who had represented Dykes before this Court and the Supreme Court on his direct appeal, filed a motion in the District Court for a writ of error coram nobis. The ground of the petition was the emergence of circumstances, i.e., the reversals of the convictions of Coleman and Tatum and the subsequent reduction of their sentences to 8 months to 2 years, which could not have been in the contemplation

of the trial judge when he sentenced Dykes, and which justified reconsideration of the sentence imposed on Dykes. The petition was addressed to the discretion of the trial judge; it made no claim of right.

After the petition was filed, but before it was heard, this Court, sitting en banc, issued its opinion in Jones, Short and Jones v. United States (Nos. 17,688-92, July 13, 1964). \*/ It held, inter alia, that the appellants, Jones and Jones, were entitled to a new trial on the ground that Short's confession implicating them had been admitted in their joint trial in violation of the Mallory rule, albeit with the Joneses' names deleted and with instructions that it was not evidence against them. The Court said:

"Since Short's confessions were not admissible even against him, there is no reason whatever for permitting them to prejudice his co-defendants." Slip opinion, p. 12.

Thereafter, in Greenwell v. United States (No. 18,193, August 13, 1964), Greenwell's conviction was reversed by this Court on the "separate and independent" ground that his co-defendant Seals' confession, inadmissible under Mallory, was admitted in their joint trial.

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\*/ An earlier opinion in the case, issued February 6, 1964, was withdrawn when the Court granted the government's petition for rehearing en banc.

"We conclude that the admission of Seals' confession, since it was improper as to Seals, justifies the retrial of his co-defendant, Greenwell, in a proceeding in which this confession does not reach the jury." Slip opinion, pp. 11-12. \*/

The crimes involved in Jones, Short and Jones took place on July 28 and August 3, 1962; the crime involved in Greenwell on September 18, 1961. The inadmissible confessions in those cases were given on September 15, 1962, and September 25, 1961, respectively. Jones, Short and Jones v. United States, supra; Seals v. United States, \_\_\_ U.S. App. D.C. \_\_\_, 325 F. 2d 1006 (1963), cert. denied, 376 U.S. 964 (1964).

The motion for a writ of error coram nobis was argued before the trial judge on July 24, 1964. At argument, counsel related the facts which had occurred subsequent to the imposition of Dykes' sentence and referred, inter alia, to the Jones, Short and Jones decision. The Court expressed doubt that it could properly consider the impact of this decision upon the matter before it and indicated further that it questioned that coram nobis was the appropriate procedural vehicle in this case. Thereupon, counsel requested the Court to consider the matter as having been brought under 28 U.S.C. §2255, if that appeared to the Court to be the correct procedure. The Court

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\*/ Again, on October 15, 1964, in Johnson and Stewart v. United States, No. 18,243-44, this Court said: "Since Johnson's [inadmissible] confession also explicitly implicated Stewart, the judgments below must be reversed for a new trial as to both defendants."

refused this request, however. Transcript of proceedings of July 24, 1964, in the District Court, Cr. No. 125-61, pp. 6-18.

Ultimately, the trial court ruled that it lacked jurisdiction under the coram nobis procedure to grant the relief sought on behalf of Dykes. Transcript, supra, p. 24. This appeal followed.

STATUTES INVOLVED

28 U.S.C. §1291 provides: Final decisions of district court.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. §1651 provides: Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. §2255 provides: Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF POINTS

1. The District Court erred in refusing to vacate appellant's judgment and sentence pursuant to 28 U.S.C. §2255.
2. The District Court erred in ruling that it was without discretionary jurisdiction pursuant to coram nobis to vacate appellant's sentence and to resentence him in light of the extraordinary circumstances that have occurred since appellant was sentenced and since his conviction was affirmed by this Court.
3. If this Court rules that the District Court is without jurisdiction to grant relief to appellant pursuant to §2255 or coram nobis, it may and should recall its judgment affirming appellant's conviction, reverse the judgment of conviction, and remand to the District Court for a new trial.

SUMMARY OF ARGUMENT

I

The record of Appellant Dykes' joint trial with multiple co-defendants, and the extraordinary events which occurred after Dykes was convicted and after his conviction was affirmed, demonstrate beyond dispute that Dykes was unfairly and unjustly convicted: Dykes was convicted with three co-defendants of murder, robbery, and car theft, after a joint trial. Alleged confessions

of all three co-defendants, which named Dykes 84 times and referred to him by pronouns 141 times, were introduced at the joint trial. Dykes' name was not deleted when the confessions were presented to the jury. The evidence against Dykes, apart from the confessions, was weak. All three co-defendants testified that they did not confess and that they were coerced. The judge did not rule that the confessions were voluntary before he submitted them to the jury. His instructions to the jury explained and justified the inadmissibility of involuntary confessions solely on the ground of untrustworthiness. Despite the three co-defendants' testimony to the contrary, he also told the jury that the confessions were made and signed by the three co-defendants. After conviction, the judge sentenced Dykes and two of the three co-defendants to 13 to 39 years. The third co-defendant was sentenced to 15 to 45 years. A fourth co-defendant, who was named in only one of the three confessions, was acquitted.

Dykes and the three convicted co-defendants appealed to this Court. This Court ruled that the confessions of two of the three co-defendants were inadmissible under Mallory. These were the two confessions in which the fourth co-defendant, who was acquitted, was not named. The convictions of the two co-defendants who gave the inadmissible confessions were reversed. These were the two

co-defendants who received the same sentence as Dykes. Dykes' conviction was affirmed. This Court ruled that the District Court did not improperly deny Dykes a separate trial, although it said that Dykes' contention to the contrary raised a substantial question. Thereafter the two co-defendants whose convictions were reversed pleaded guilty to car theft and the murder and robbery charges against them were dismissed. They were sentenced to 8 months to 2 years imprisonment. A year later this Court, sitting en banc, ruled that a defendant is entitled to a new trial if in a joint trial with a co-defendant the jury hears the inadmissible confession of the co-defendant linking the defendant to the crime. Jones, Short and Jones v. United States. The decision of this Court in Dykes' case appears to be the only case holding to the contrary. At about the same time, the Supreme Court ruled in a habeas corpus case that the Constitution requires that the trial judge must rule that an allegedly coerced confession is voluntary before he submits it to the jury. Jackson v. Denno. Furthermore, a series of recent decisions in this Court and the Supreme Court showed that the alleged confessions of the three co-defendants were taken contrary to their constitutional right to counsel.

This is an appeal from the District Court's refusal to give Dykes collateral relief from his conviction despite the indisputable unfairness and injustice of the conviction as demonstrated by the trial record and by the extraordinary events that followed the conviction. In the following arguments, we show that the District Court erred in refusing collateral relief, and that at the very least this Court should recall its judgment affirming the conviction and reverse the judgment of conviction.

## II

The circumstances outlined above show that Dykes was denied the substance of a fair trial, and thus he is entitled to vacation of the judgment against him pursuant to 28 U.S.C. §2255. In a trial with four co-defendants for a capital crime, in which the admissible evidence against Dykes was weak, confessions of three co-defendants, which named Dykes repeatedly, were submitted to the jury with Dykes' name not deleted. Later this Court held two of the confessions inadmissible under Mallory, and the co-defendants who allegedly gave these confessions were acquitted on remand. The fourth co-defendant, who was not named in these confessions, was acquitted by the jury. Recent cases show that the conviction of a defendant whose co-defendant's inadmissible confession is admitted at their joint trial cannot

stand, and is unconstitutional, and also that all three confessions were taken unconstitutionally and submitted to the jury by a procedure and with instructions which were unconstitutional. We submit that all these circumstances make it indisputably clear that Dykes was denied due process at his trial, and that, therefore, he is entitled to §2255 relief. The fact that Dykes relies in part upon cases issued after affirmance of his conviction does not preclude, but instead supports, his claim for §2255 relief. And since he took a direct appeal, he cannot be said to have abandoned his present right to §2255 relief.

### III

Even if Dykes is not entitled to vacation of the judgment against him pursuant to §2255, the District Court has discretionary jurisdiction pursuant to coram nobis to vacate his sentence and resentence him in light of the extraordinary events that have followed imposition of the sentence and affirmance of the conviction, including the ultimate acquittal of the murder and robbery of Coleman and Tatum, whom the trial judge plainly intended to punish equally with Dykes, and the other events which have demonstrated the injustice of Dykes' conviction. If the District Court had foreseen the ultimate outcome when all the defendants

first came on for trial, there can be no doubt that it would never have permitted them to be tried together or, having permitted them to be tried together, there can be no doubt that it would not have imposed upon Dykes a sentence twenty times as severe as the sentences ultimately imposed on Coleman and Tatum. The essence of the leading coram nobis cases, United States v. Morgan and Thomas v. United States, is that where §2255 does not lie to correct a serious injustice on collateral attack, coram nobis will lie. Therefore, if the District Court does not have jurisdiction to vacate the judgment under §2255, it at least has jurisdiction under coram nobis to vacate and modify the sentence which, like the conviction, is plainly unjust.

#### IV

Under the authority of its Byrd case, this Court may and should, if it denies other relief, recall its mandate affirming Dykes' conviction and reverse the judgment of conviction. The decision of this Court affirming Dykes' conviction is directly contrary to this Court's decision in Jones, Short and Jones v. United States, and, indeed, appears to be the only case in which the conviction of a defendant was upheld in the face of the erroneous admission of his co-defendant's confession linking him to the

crime. And in Dykes' case, in contrast to Jones, Short and Jones, not one but at least two inadmissible confessions were admitted and Dykes' name was not deleted when they were. The grave injustice of Dykes' conviction is today beyond dispute. Whether or not Dykes is entitled to relief under §2255 or coram nobis, the Court can correct this injustice by recalling its judgment of affirmance from the District Court and reversing the judgment of conviction. The Byrd case in this Court, a case closely analogous to Dykes' case, shows that the Court has the power to do this. The Supreme Court case of Fay v. Noia shows that the New York Court of Appeals also exercises the power to recall judgments of affirmance at any time in order to correct manifest injustice.

ARGUMENT

Introduction

On December 20, 1962, this Court issued its opinion affirming appellant Dykes' conviction for murder, robbery, and unauthorized use of a vehicle. Time, however, has shown (a) that Dykes was unjustly convicted in the District Court, and (b) that he is entitled to attack the conviction collaterally and to secure a new trial or re-sentencing.

I

APPELLANT WAS OVERWHELMINGLY PREJUDICED AND UNFAIRLY CONVICTED BY THE ADMISSION INTO EVIDENCE AT HIS JOINT TRIAL WITH FOUR CO-DEFENDANTS OF THE CONFESSIONS OF TWO OF THE CO-DEFENDANTS, WHICH UNDER BOTH MALLORY AND THE CONSTITUTION WERE IMPROPERLY TAKEN AND IMPROPERLY ADMITTED INTO EVIDENCE, AND WHICH, TOGETHER WITH THE CONFESSION OF A THIRD CO-DEFENDANT, WERE SUBMITTED TO THE JURY BY A PROCEDURE AND WITH INSTRUCTIONS WHICH WERE ALSO UNCONSTITUTIONAL. THE SUBSTANTIALITY OF THE UNFAIRNESS AND PREJUDICE IS HIGHLIGHTED BY THE ULTIMATE ACQUITTAL OF THE TWO CO-DEFENDANTS WHO GAVE THE TWO INADMISSIBLE CONFESSIONS AND OF THE FOURTH CO-DEFENDANT, WHO LIKE DYKES, DID NOT CONFESS BUT WHO, UNLIKE DYKES, WAS NOT NAMED IN THE INADMISSIBLE CONFESSIONS.

A. The admission at Dykes' Trial of the Inadmissible Confessions of Two of His Co-defendants Was Grossly Unfair and Prejudicial to Dykes.

Were Dykes' case before this Court today on direct appeal, it is beyond dispute that his conviction would be reversed. In

Jones, Short and Jones v. United States (Nos. 17,688-92, July 13, 1964); Greenwell v. United States (No. 18,193, August 13, 1964); Johnson and Stewart v. United States (Nos. 18,243-44, October 15, 1964), this Court has held that a defendant is entitled to a new trial if in a joint trial with a co-defendant the jury hears the inadmissible confession of the co-defendant linking the defendant to the crime. \*/ In Dykes' case, the jury heard the inadmissible oral and written confessions of not one but two co-defendants. Dykes' name appeared in the confessions and was read or reported to the jury no less than 84 times. He was referred to by pronouns in the confessions, and the pronouns were read or reported to the jury no less than 141 times. In Jones, Short and Jones and in Greenwell, \*\*/ as in Dykes' case, limiting instructions were given to the jury. \*\*\*/ In Jones, Short and Jones and in Greenwell, the name of the defendant

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\*/ See also, Abrams, Gordon and Ledes v. United States, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, 327 F. 2d 898 (1964); Cross and Jackson v. United States, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, 335 F. 2d 987 (1964); Drew v. United States, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, 331 F. 2d 85 (1964).

\*\*/ See, supplemental memoranda of the parties.

\*\*\*/ In Dykes' case, the first limiting instruction was given a day after Coleman's and Tatum's oral confessions, naming Dykes, were first reported to the jury. The jury was never told that the limiting instruction applied to the oral confessions, though the judge was asked that it be so told.

was deleted when the co-defendant's inadmissible confession was given to the jury. Dykes' name was not deleted when Coleman's and Tatum's inadmissible confessions were given to the jury.

The gross unfairness to Dykes of the admission of Coleman's and Tatum's inadmissible confessions at their joint trial is made manifest not only by the innumerable times he was named in the confessions but also by the facts as to how the case turned out for Coleman, Tatum, and the co-defendant Washington. On the day that it affirmed Dykes' conviction for murder, robbery, and unauthorized use of a vehicle, this Court reversed Coleman's and Tatum's convictions of the same crimes because their confessions were erroneously admitted into evidence. In May, 1963, Coleman and Tatum pleaded guilty to unauthorized use of a vehicle. The murder and robbery charges against them were dismissed. They were sentenced to a prison term of 8 months to 2 years. \*/ Dykes is serving a sentence of 13 to 39 years. Thus, because of the inadmissibility of their confessions, Coleman and Tatum have been found not guilty of the murder and robbery and must serve a maximum sentence of only 2 years. But Dykes, despite the inadmissibility

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\*/ Coleman and Tatum will be released from prison, if they have not already been released, by May 31 of next year.

of the confessions which, as this Court's decisions have since held, for all practical purposes were admitted against him, has been found guilty of the murder and robbery and must serve a maximum of 39 years. The very confessions which unlocked the prison door for Coleman and Tatum have closed it behind Dykes.

Analysis of the acquittal of Washington, the co-defendant of Dykes, Coleman, Jackson and Tatum, also provides overwhelming proof of the gross prejudice to Dykes of the admission of Coleman's and Tatum's inadmissible confessions in their joint trial. Washington was named as a participant in the crimes in Jackson's admissible confession. He was not named in Coleman's and Tatum's inadmissible confessions. Dykes was named in all three confessions. \*/ The result was that Washington was acquitted and Dykes convicted of the murder and robbery. The fact that Washington was not named in Coleman's and Tatum's confessions helped him as surely as the fact that Dykes was named in those confessions hurt Dykes. Both Dykes and Washington were

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\*/ Washington's counsel objected successfully to deletion of the co-defendants' names from the two confessions when they were read to the jury. He even pointed out to the jury in his summation that Washington was named in only one of the three confessions. See statement of the case, supra, pp. 5-6. He is a trial lawyer who knew that it was "unmitigated fiction" to think that the jury would consider the confessions only against their makers. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Concurring opinion of Mr. Justice Jackson).

named in Jackson's confession but the difference between guilt and innocence was whether or not they were named in Coleman's and Tatum's confessions. Where the question of who was or was not named in their co-defendant's confessions should have made no difference in the jury's consideration of Washington's and Dykes' case, it made all the difference. The injustice to Dykes of this situation is compounded by the fact that Coleman's and Tatum's confessions, which made the difference between Washington's acquittal and Dykes' conviction, were inadmissible not only against Dykes but against Coleman and Tatum as well. The injustice is further compounded by the fact that the inadmissible confessions were ultimately not allowed to prejudice their makers. Yet it is clear that they overwhelmingly prejudiced Dykes.

In affirming Dykes' conviction, this Court held that there was sufficient competent evidence aside from the confessions to support the conviction. It said (114 U.S. App. D.C. at 190, 313 F. 2d at 581):

"There was evidence from which the jury might have found that Dykes was with the other appellants immediately before and after the robbery-killing, that he fled to New York under an alias with articles stolen from the get-away car, and that he admitted to an acquaintance that he was an active participant in the robbery."

But in light of the subsequent dismissal of the murder and robbery charges against Coleman and Tatum and their conviction only of unauthorized use of a vehicle, the worth and/or the admissibility against Dykes of almost all of this evidence is destroyed. It is meaningless that he was with the other appellants immediately before and after the robbery-killing if two of those three have been acquitted by process of law of involvement in the robbery-killing. Again, though there was evidence linking Dykes to the stolen car, the only evidence that it was the get-away car for the robbery-killing was in the three confessions, which not only are inadmissible against Dykes, but also in two out of three instances are inadmissible against the confessor. Thus, the fact that Dykes was found in possession of articles taken from the car which was stolen the night of the murder is evidence not that the car was the get-away car but only that Dykes could have been involved in the minor offense of theft of the car. Coleman and Tatum have been convicted of that crime, but only of that crime. Evidence which the government has not been able to use to convict Coleman and Tatum of the greater crime cannot be cited by the government to uphold Dykes' conviction of the greater crime.

This Court said:

"There was evidence from which the jury might have found that Dykes . . . admitted to an acquaintance that he was an active participant in the robbery."

This refers to the testimony of Paul Gordon. Gordon's testimony as to what he was told by Dykes was vague, disjointed and contradictory. \*/ It made no reference to the stolen automobile. Gordon testified that he was under threat of being charged himself with the robbery when he told the police that Dykes had implicated himself to him. He said that he gave the police this statement about Dykes only late in the evening of a day in which he was in police custody. He testified that during this day he was subjected to some six hours of questioning and was given no lunch or dinner. He was kept in "the cell block" that night and did not sign the statement until noon of the next day. Tr. 1264-1271 (jury not present), 641-648, 1621-1626 (jury present). Thus, the case against Dykes was weak indeed. But even if it had been strong, Dykes was entitled to have it put before the jury unbolstered by the three lengthy and detailed confessions of his co-defendants which repeatedly named and totally implicated him, two of which were inadmissible even against their makers.

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\*/ In this connection, the Court is requested to read Trial Tr. 568-618, 641-648, 1264-1271, 1621-1626, which constitutes all of the testimony of Gordon given in and out of the presence of the jury.

B. The Confessions of Dykes' Three Co-defendants Which Were Admitted at Dykes' Trial Were Unconstitutionally Taken and Unconstitutionally Submitted to the Jury.

The illegality of Dykes' conviction is not limited to the matters discussed above. Recent cases from several courts make it clear that violation of the Constitution penetrated every aspect of the taking of the confessions used at Dykes' trial and their introduction into evidence.

Coleman's and Tatum's confessions were held inadmissible on Mallory grounds. It is today clear, however, that these confessions were also taken unconstitutionally. \*/ The facts as

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\*/ We accept for purposes of argument the proposition that Mallory has nothing to do with the Constitution. In fact, the law is fast approaching the point, if it has not already reached it, where prompt presentment to a magistrate after arrest in federal jurisdictions is a requirement of both the 5th and 6th amendments. See, Escobedo v. Illinois, 378 U.S. 478 (1964); Jackson v. Denno, 378 U.S. 368 (1964); Massiah v. United States, 377 U.S. 201 (1964); Killough v. United States, 114 U.S. App. D.C. 305, 315 F. 2d 241 (1962); Greenwell v. United States, supra. See also the opinions in Muschette v. United States, 116 U.S. App. D.C. 239, 322 F. 2d 989 (1963), judgment vacated and case remanded, 378 U.S. 569 (1964). Muschette, who confessed, alleged coercion, as did Coleman, Tatum and Jackson. This Court held that Muschette's confession was not inadmissible under Mallory. It also said: "The question whether the confession was voluntary was submitted to the jury and its verdict shows it did not accept Muschette's statement that he had been coerced by police brutality." The Supreme Court's reversal and remand of the Muschette case on Jackson v. Denno grounds does not, technically speaking, disturb this Court's Mallory holding in the case. But, in fact, the Supreme Court's action undercuts that holding, and its concern with the constitutional question of proof of alleged coercion illustrates the close connection between Mallory and the Constitution.

recited in this Court's opinions in Coleman's and Tatum's cases, 114 U.S. App. D.C. 185, 188, 313 F. 2d 576, 579, are that Coleman and Tatum were questioned more or less extensively for several hours after their arrest before they gave their confessions. According to police testimony, see statement of the case, supra, the police, after arresting Coleman and Tatum, gave them "their own substitute for a magistrate's advice as to [their] rights." Greenwell v. United States, supra, slip opinion, p. 3. Coleman was told he didn't have to make a statement and that any statement he made could be used against him. Tatum was given the last part of this advice but not, except perhaps by inference, the first part. The written statement of warning preceding both their written confessions gave only the last part. Neither Coleman nor Tatum was advised of his right to counsel before he gave his confession. Neither had counsel before that time. Thus, both confessions were taken contrary to Coleman's and Tatum's right to counsel under the 6th amendment. Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Ricks v. United States, \_\_\_\_ U.S. App. D.C. \_\_\_\_, 334 F. 2d 964 (1964); Greenwell v. United States, supra; People v. Dorado, 394 P. 2d 952,

953:

"We hold, in the light of recent decisions of the United States Supreme Court, that, once the investigation focused on defendant, any incriminating statements given by defendant during interrogation by the investigating officers became inadmissible in the absence of counsel and by the failure of the officers to advise defendant of his right to an attorney and his right to remain silent." \*/

Compare John W. Jackson, Jr., v. United States (No. 17,746, decided August 13, 1964), petition for certiorari filed November \_\_, 1964, where the defendant confessed after he received judicial advice as to his rights, including the right to counsel. Compare also Long v. United States (No. 18,368, decided October 22, 1964), where the confession was initiated voluntarily by Long before he was questioned and where Long did not testify at the

\*/ Dykes' co-defendant Jackson also, according to police testimony, was not told of his right to counsel and he also did not have counsel when he confessed. The police said they told him he didn't have to make a statement and that any statement he made could be used against him. The written warning preceding his written statement advised him that "your statement must be made freely and voluntarily; also that your statement will be used in court at your trial if it becomes necessary." His confession, according to the police, came more promptly than Coleman's and Tatum's, but he was taken to the homicide squad room at the Municipal Center for the purpose of questioning and he did not, unlike the defendant in Long v. United States, infra, confess sua sponte. Counsel and advice as to his right to counsel being absent, it would appear that Jackson's confession was also unconstitutionally taken.

hearing out of the presence of the jury. (Coleman, Tatum, and Jackson all testified to coercion out of the presence, as well as in the presence, of the jury).

There was no testimony that Coleman, Jackson, and Tatum asked for the opportunity to consult a lawyer. Neither the Supreme Court nor this Court has had before it a case where the only distinction differentiating it from Escobedo v. Illinois, supra, is the failure of the defendant to ask for counsel. It seems to us unthinkable that when such a case is presented, and the instant case is such a case, either court will hold that such a distinction makes a difference. Carnley v. Cochran, 369 U.S. 506, 513 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938) (no presumption of waiver of counsel); Lee v. United States, 322 F. 2d 770, 777 (5th Cir. 1963). To the same effect is the recent case in this Court of Blue v. United States (No. 18,401, decided October 29, 1964) (Legal Aid Act does not make request by defendant a condition of appointment of counsel at preliminary hearing). And in People v. Dorado, 394 P. 2d 952, at 956-958, the Supreme Court of California, in a lengthy discussion, rejected the contention that the confession there at issue was waived by the defendant's failure to request counsel.

See also, Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963). Thus, not only were Coleman's and Tatum's confessions obtained contrary to Mallory, but also their confessions, and Jackson's as well, were obtained in violation of the Constitution. Yet these confessions were permitted to prejudice Dykes and to bolster the extremely weak case against him.

It is also beyond dispute that the three confessions were put before the jury in a manner violative of the Constitution. In the first place, the trial judge, faced with defense testimony of coercion, failed to make an independent determination as to whether the confessions were voluntary. He ruled merely that they were not involuntary as a matter of law and then permitted the jury to pass on their voluntariness. Tr. 1292-1295, 1368-1369. This procedure was plainly improper, and constitutionally so, under Jackson v. Denno, 378 U.S. 368 (1964). \*/ See also, Muschette v. United States, supra, and Pea v. United States, 116 U.S. App. D.C. 410, 324 F. 2d 442 (1963), judgment vacated and case remanded, 378 U.S. 571 (1964), cases from this

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\*/ Under Jackson v. Denno, this defect might be cured as to Jackson's confession by a remand and a ruling by the trial judge, if at this late date he felt he could make it, as to whether or not the confession was voluntary. But, in the case of the confessions of Coleman and Tatum, who have been acquitted of the serious crimes and have pleaded guilty to the minor one, there could be no occasion for such a hearing. And, thus, there is no assurance that the inadmissible confessions would have been before the jury that convicted Dykes at all if the judge had applied the correct standard.

circuit in which the Supreme Court, on Jackson v. Denno grounds, reversed convictions in which allegedly coerced confessions were admitted into evidence. In the second place, the trial judge, in submitting the three confessions to the jury, explained the inadmissibility of involuntary confessions solely on the basis of their untrustworthiness. Tr. 1992-1994. He did not tell the jury that, even if involuntary confessions are trustworthy, their use to convict is impermissible. This was a defect in the charge of constitutional proportions. Jackson v. Denno, 378 U.S. 368, 376:

"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, 5 L ed 2d 760, 81 S Ct 735, and even though there is ample evidence aside from the confession to support the conviction. Malinski v. New York, 324 U.S. 401, 89 L ed 1029, 65 S Ct 781; Stroble v. California, 343 U.S. 181, 96 L ed 872, 72 S Ct 599; Payne v. Arkansas, 356 U.S. 560, 2 L ed 2d 975, 78 S Ct 844. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Rogers v. Richmond, supra."

See also, 378 U.S. at 381-389; Rogers v. Richmond, 365 U.S. 534, 543-544:

"From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were inadmissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment."

Finally, Coleman, Tatum, and Jackson had all testified at the trial that they did not make the confessions that were introduced against them, and that, to the extent that they made the confessions, they were coerced. But the trial judge removed the issue raised by this testimony from the jury's consideration when he told the jury (Tr. 1992):

"These statements were made and signed by the defendants while in the custody of the police."

Thus,

"The court clearly told the jury what the facts were [respecting the absolutely crucial issue of the confessions], as the court itself had decided them to be. The right of a federal judge to comment upon the evidence does not go so far. The defendant may not thus be deprived of the substance of trial by jury guaranteed by the Sixth Amendment." Hardy v. United States (No. 18,515, decided June 25, 1964).

Thus, we have the situation of Dykes' being convicted on the basis of co-defendants' confessions which were inadmissible not only on Mallory grounds but also on constitutional grounds, and which were submitted to the jury in a manner which in three different respects was not merely improper but actually unconstitutional.

II

THE ADMISSION AT DYKES' TRIAL OF THE THREE CONFESSIONS OF HIS CO-DEFENDANTS, TWO OF WHICH WERE INADMISSIBLE UNDER MALLORY AND ALL THREE OF WHICH WERE UNCONSTITUTIONALLY OBTAINED AND UNCONSTITUTIONALLY SUBMITTED TO THE JURY, DENIED DYKES THE SUBSTANCE OF A FAIR TRIAL. THE DISTRICT COURT THEREFORE ERRED IN REFUSING TO VACATE DYKES' CONVICTION PURSUANT TO 28 U.S.C. § 2255.

We have discussed at length how the admission at Dykes' trial of the inadmissible confessions of his co-defendants was grossly unfair and how it grossly prejudiced Dykes. We think there can be no dispute at all about this unfairness and prejudice. The only issue before the Court is whether the serious error complained of entitles Dykes to collaterally attack his conviction by means of 28 U.S.C. §2255, coram nobis, or otherwise. We submit that it does.

First, we assert that Dykes is entitled to vacation of the judgment of conviction pursuant to 28 U.S.C. §2255. Technically it can be argued that no appeal from a denial of a §2255 motion is before this Court. Counsel petitioned the District Court on behalf of Dykes for coram nobis before this Court's decision in Jones, Short and Jones, supra, issued. Counsel argued the petition shortly after that case issued, and asked the District Court to consider the coram nobis petition as a §2255 motion if that appeared to the Court to be the

correct procedure. The judge refused to do so. Nevertheless, the Section 2255 issue is ripe for decision in this Court. All relevant facts are before this Court. There is no occasion for a hearing to develop new facts. This Court can appropriately pass on Dykes' Section 2255 claim now. "The labels are, of course, not controlling." Thomas v. United States, 106 U.S. App. D. C. 234, 237, 271 F. 2d 500, 503 (1959); United States v. Morgan, 346 U.S. 502, 504-505 (1954); United States v. Rutkin, 212 F. 2d 641 (3d Cir. 1954).

As to the merits: No pat formulas govern the availability or lack of availability of §2255 to a convicted defendant. The cases which are often cited for such propositions as that the failure of the trial judge to give a certain instruction, and that errors in the admission of evidence cannot be attacked under §2255 will invariably be found upon examination to have depended upon, and to be limited to, their circumstances. Such cases cannot automatically be said to control other cases. \*/ In §2255 situations, courts have rarely failed

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\*/ The present case does not involve the situation which underlies numerous cases in which habeas corpus or §2255 relief is denied, where the defendant's opportunity for collateral relief was compromised by his failure to take a direct appeal. Sunal v. Large, 332 U.S. 174 (1947); Hodges v. United States, 108 U.S. App.

to consider with care alleged or real injustices of even less magnitude than that revealed in the present case. See, for example, the lengthy opinion of Judge Friendly in Sobell v. United States, 314 F. 2d 314 (1963). We have found no case where the Court has denied collateral relief in a situation where constitutional injustice of the magnitude exhibited by this case has been demonstrated. Reduced to its essentials, for error to entitle a convicted defendant to \$2255 relief, it must amount to denial of due process. The statute itself states that relief will be granted where "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." "Mere errors of law committed in the course of a trial" are not

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\*/ (Footnote from preceding page continued) - 375, 282 F. 2d 858 (1960), certiorari dismissed as improvidently granted, 368 U.S. 139 (1961); Smith v. United States, 88 U.S. App. D.C. 80, 187 F. 2d 192 (1950), cert. denied, 341 U.S. 927 (1951); and see Bowen v. Johnston, 306 U.S. 19 (1939) and Fay v. Noia, 372 U.S. 391 (1963), where even this defect did not bar collateral relief. In the latter case, Noia had been convicted with two co-defendants in the New York courts by means of coerced confessions. The co-defendants were freed on habeas corpus some 15 years after their conviction. The Supreme Court found that habeas corpus lay as to Noia also, despite his failure to take a direct appeal from his conviction. The present case is strikingly similar to Fay v. Noia, except that Dykes' position is not complicated, as was Noia's, by a failure to take a direct appeal or by the necessity of a proper regard by the federal courts for state prerogatives.

sufficient but "deprivation of constitutional rights amounting to denial of the essence of a fair trial" entitles a defendant to collateral relief. Meyers v. United States, 86 U.S. App. D.C. 320, 321, 181 F. 2d 802, 803 (1950); Howell v. United States, 172 F. 2d 213, 215 (4th Cir. 1949) ("denial of the substance of a fair trial"). "A conviction so procured [by entrapment] is in violation of the due process provision of the 5th amendment and hence (emphasis supplied) the contentions of the server of the sentence are within the court's jurisdiction in a §2255 proceeding." Banks v. United States, 249 F. 2d 672 (9th Cir. 1951). The injustice done Dykes by the admission of his co-defendant's inadmissible confessions at his trial is encompassed by this standard. \*/

\*/ The fact that Dykes asserted as error on direct appeal the denial of his motion for severance does not preclude the present collateral attack. The cases which assert that contentions decided on appeal are not open to review under §2255, like other cases denying §2255 relief, depend on their circumstances. Invariably they will be found to involve situations where the court rules there is no error, or reaffirms its original decision, or where the alleged error is insignificant, or has not been demonstrated, or was waived. We have found no case that denies §2255 relief on the ground of a prior appeal where there was unwaived error indisputably established by events following the affirmation, as there is in Dykes' case, and where the error was as fundamental as the error in Dykes' case. Compare Lampe v. United States, 110 U.S. App. D.C. 69, 288 F. 2d 881 (1961), cert. denied, 368 U.S. 958. And see Townsend v. Sain, 372 U.S. 293 (1963) (contention decided adversely to defendant on direct appeal, including petition for certiorari, successfully revived on habeas corpus).

The admission in Dykes' trial of the inadmissible confessions of his co-defendants, Coleman and Tatum, which named Dykes 84 times, referred to him by pronouns 141 times, and implicated him completely in the crime with which he was charged, denied him the substance of a fair trial and, therefore, due process of law. These confessions were not a garden variety of hearsay. No confession is. "A confession is a most persuasive form of proof. It is difficult to conceive its admission being non-prejudicial under any circumstances." Elsie Jones v. United States, 113 U.S. App. D.C. 256, 258, 307 F. 2d 397, 399 (1962). Thus, the courts have been exceedingly diligent to protect defendants from unjustly taken or unjustly used confessions. The inadmissible confessions introduced at Dykes' trial were obtained in violation of Mallory and the Constitution and were submitted to the jury by an unconstitutional procedure and with unconstitutional instructions. The confessions did not inhabit merely the fringes of Dykes' case. The government's case against Dykes had no coherence or meaning, and indeed practically no existence, without them. Their admission in Dykes' trial totally destroyed any

opportunity he had for a fair trial. Jackson v. Denno, supra; Escobedo v. Illinois, supra; Massiah v. United States, supra; Jones, Short and Jones v. United States, supra; Greenwell v. United States, supra; Johnson and Stewart v. United States, supra; Hardy v. United States, supra; Ricks v. United States, supra; People v. Dorado, supra. This is indisputably apparent on the face of the confessions themselves, as well as from the analysis, given in Argument I, supra, of the trial record and of the ultimate disposition of Coleman's and Tatum's and Washington's cases. This denial of due process entitles Dykes to vacation of his sentence under §2255.

In Jones, Short and Jones, Greenwell, and Johnson and Stewart, supra, cases decided by this Court on direct appeal, there was no occasion for the Court to state whether or not the reversal of the convictions of the defendants tried with co-defendants whose inadmissible confessions went to the jury was based on due process grounds or not. But it is impossible to see how it could be argued today that the admission of such confessions in the trials of the Joneses, Greenwell, Stewart, and Dykes did not violate due process. The language in Jones, Short and Jones, Greenwell, and Johnson and Stewart is so emphatic as to imply denial of due

process. And beyond what is said in those cases, there is the fact that the inadmissible confessions used in Dykes' trial were unconstitutionally obtained and unconstitutionally presented to the jury. Jackson v. Denno, Escobedo v. Illinois, Massiah v. United States, Ricks v. United States, Greenwell v. United States, Hardy v. United States, People v. Dorado, supra. Moreover, in Dykes' case, as opposed to Jones, Short and Jones and Greenwell, the defendant's name was not deleted from the confession, and not one, but two, inadmissible written confessions were admitted. In addition, three police officers testified to two inadmissible oral confessions and named Dykes in their testimony. And limiting instructions were not given with respect to this testimony. \*/

\*/ This Court should note also that its decision in Dykes' appeal is apparently the only federal case extant in which a defendant who was implicated by his co-defendants' inadmissible confessions has had a conviction affirmed. No such case was cited by this Court or the government in Dykes' appeal. No such case save Dykes' was cited by the government in Jones, Short and Jones, in Greenwell, or by the dissent in Jones, Short and Jones. The one state case generally cited in support of the proposition that the admission of a co-defendant's inadmissible confession need not vitiate a defendant's confession is Malinski v. New York, 324 U.S. 401 (1945). There the Supreme Court upheld the defendant Rudish's conviction despite its ruling that Malinski's confession was inadmissible because coerced, but the Supreme Court did this to preserve a proper state-federal balance. See Jones, Short and Jones, supra. And the opinion of the Supreme Court in Stein v. New York, 346 U.S. 156, 194 (1953), shows that New York gave Rudish a new trial. Another major case in this area is

(continued on next page)

The chief case relied on by the government in all of these cases has been Delli Paoli v. United States, 352 U.S. 232 (1957), a conspiracy case in which the Supreme Court, in a five to four decision, sustained the conviction of a defendant named in the admissible confession of his co-defendant with whom he was jointly tried. Aside from being distinguishable, Delli Paoli has been overruled by Jackson v. Denno, supra. Not only did Justice Harlan's dissent in Jackson v. Denno say so, 378 U.S. at 433, but also the majority opinion of Justice White cites and quotes, at 378 U.S. 388, n.15, the dissenting opinion of Justice Frankfurter in Delli Paoli as follows:

"See also Delli Paoli v. United States, 352 U.S. 232, 248 . . . 'The Government should not have the windfall of having the jury be influenced by evidence against the defendant which as a matter

\*/ (Footnote from preceding page continued) - Anderson v. United States, 318 U.S. 350 (1943), a federal case where the Supreme Court ordered a new trial for a defendant tried jointly with other defendants whose confessions, inadmissible under McNabb v. United States, 318 U.S. 332 (1943), were put before the jury. In Dykes' case, this Court cited Malinski (cf.) and distinguished Anderson. In Jones, Short and Jones, it cited Anderson and distinguished Malinski. In Greenwell, it cited Anderson. It is impossible to find any meaningful distinction between the facts relating to the issue of the treatment of confessions in joint trials in the present case and the facts relating to that issue in Jones, Short and Jones and Greenwell, except distinctions which favor Dykes.

of law they should not consider but which they cannot put out of their minds.' (Dissenting opinion of Mr. Justice Frankfurter relating to use of a confession of a codefendant under limiting instructions.)"

The opinion in Jackson v. Denno, which cites the Delli Paoli dissent, is itself a case where the Supreme Court held that submission to the jury of the question of voluntariness of a confession was required by the due process clause of the 14th amendment to be preceded by a finding of voluntariness by the trial judge. 378 U.S. at 391. See also dissent of Justice Black, 378 U.S. at 407. The Supreme Court's citation of the dissent in Delli Paoli in such a context cannot reasonably be said to give less than constitutional weight to the principle expressed in that dissent. The Delli Paoli dissent itself, approving Judge Frank's dissent from affirmance of the conviction in the Second Circuit, spoke of the "inevitable unfairness" of the procedure employed at Delli Paoli's trial. 352 U.S. at 248. We can see no basis for an argument that the unfairness was less than constitutionally unfair. \*/ See also the citation and quotation of the Court in Jackson v. Denno of Rideau v. Louisiana, 373 U.S. 723, 727 (1963), immediately

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\*/ See, in this connection, Justice Black's dissent in Jackson v. Denno, 378 U.S. at 407, which complains that the Court has raised unfairness to the status of a constitutional defect. And so it has.

preceding its citation of the dissent in Delli Paoli, 378 U.S. at 388, n.15. The quotation from the Rideau case expressly refers to due process:

"But we do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'"

Certainly, in the circumstances of this case, due process is an empty phrase if it is held that the admission of Coleman's and Tatum's inadmissible confessions at Dykes' trial did not deny Dykes due process.

Appellant herein places chief reliance on cases issued since his conviction was affirmed on appeal. Jackson v. Denno, Escobedo v. Illinois, Massiah v. United States, Jones, Short and Jones v. United States, Greenwell v. United States, Johnson and Stewart v. United States, Hardy v. United States, People v. Dorado, supra. But the law is quite clear that, where there are defects in a conviction of constitutional proportions, the conviction can be attacked by habeas corpus or §2255 even if the unconstitutionality of a conviction is established by cases issued after the conviction becomes final. This is proved by the fact that many cases which establish new constitutional law in the criminal area are habeas corpus cases brought after

a conviction becomes final. Jackson v. Denno, supra; Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938). In some of these cases, as in the present case, there has been a direct appeal and a denial of certiorari by the Supreme Court. Jackson v. Denno, supra. In addition, many cases specifically establish the retroactivity of newly promulgated principles of constitutional law. Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Palumbo v. New Jersey, 334 F. 2d 524 (3d Cir. 1964) (Right to counsel established by Gideon v. Wainwright, supra, is retroactive); Farnsworth v. United States, 98 U.S. App. D.C. 59, 232 F. 2d 59 (1956) (Right to counsel established by Johnson v. Zerbst, supra, is retroactive); Smith v. Crowse, 378 U.S. 584 (1964) (Right to counsel on appeal established by Douglas v. California, 372 U.S. 353 (1963) is retroactive); Eskridge v. Washington Prison Board, 357 U.S. 214 (1958) (Right to appeal established by Griffin v. Illinois, 351 U.S. 12 (1956) is retroactive); Hall v. Warden, 313 F. 2d 483 (4th Cir. 1963), cert. denied sub nom. Pepersack v. Hall, 374 U.S. 809; California v. Hurst, 325 F. 2d 891 (9th Cir. 1964), petition for cert. filed, 33 L.W. 3008 (Principle of Mapp v. Ohio, 367 U.S. 643 (1961), that unconstitutionally seized

evidence is inadmissible in state prosecutions, is retroactive). \*/

It should also be noted that Dykes did not waive any of his §2255 rights by failure to make appropriate objections at his trial. Nothing could be clearer than that he opposed, at every step of the proceedings, use by the prosecution at his trial of his co-defendants' confessions. Also, he is not prejudiced by his failure to object to the procedure, which Jackson v. Denno, supra, showed was unconstitutional, utilized by the judge in submitting the confessions to the jury. It is clear from the opinion of the Supreme Court in Jackson v. Denno, as well as from the New York Court of Appeals opinions in Jackson's direct appeal, 177 N.E. 2d 59, 178 N.E. 2d 234, that Jackson raised for the first time on habeas corpus his objection to the procedure by which his confession was submitted to the jury. Furthermore, Dykes' failure to object to the trial

\*/ In United States v. Walker, 323 F. 2d 11 (5th Cir. 1963), cert. granted, 32 L.W. 3400, and Angelet v. Fay, 333 F. 2d 12 (2nd Cir. 1964), cert. granted, 33 L.W. 3128, the 5th and 2nd Circuits held that Mapp is not retroactive. Certiorari, which was denied in Hall v. Warden, supra, (Mapp retroactive) has been granted in these cases. See also Sisk v. Lane, 331 F. 2d 235 (7th Cir. 1964) (Mapp not retroactive). Even if the Supreme Court were ultimately to hold that Mapp is not retroactive, it would not affect Dykes' case, for the principle ground of the non-retroactivity holdings is that the Mapp rule was established as a deterrent to unlawful police conduct and that application of it to old convictions can have no deterrent effect. Here Dykes seeks collateral relief because it is now clear, if it was not before, that Dykes, like the defendants in the habeas corpus and other retroactivity cases cited above, was not given a fair trial and that the procedure employed at his trial denied him due process.

judge's erroneous instructions respecting the jury's consideration of the allegations of coercion by his co-defendants does not prejudice him. In Stevenson v. Boles, 331 F. 2d 939 (4th Cir. 1964), petition for cert. filed, 33 L.W. 3044, the 4th Circuit granted a new trial on habeas corpus in a state case where the trial judge, without objection, failed to charge the jury respecting the issue of voluntariness of the defendant's confession. The Court cited this Court's decision in Crosby v. United States, 114 U.S. App. D.C. 233, 314 F. 2d 238 (1962), in which the absolute necessity of proper procedures when the question of coercion is raised is emphasized. The 4th Circuit said (331 U.S. at 942):

"In the case before us, to repeat, no prayer for such an instruction was offered, but the question of voluntariness had been raised with sufficient point to require an express admonition to the jury by the Court sua motu. Moreover, 'the duty of maintaining constitutional rights of a person on trial for his life [Dykes stood trial for his life] rises above mere rules of procedure.' Brown v. Mississippi, 297 U.S. at 287."

The instruction of the trial judge in Dykes' case, which laid the inadmissibility of coerced confessions on the false foundation of their possible untrustworthiness and which substantially removed the issue of coercion from the jury, was no less constitutionally erroneous than the judge's failure to instruct in

Stevenson v. Boles, Dykes' failure to object to the instruction should prejudice him no more than Stevenson's failure to object prejudiced Stevenson. See also Rogers v. Richmond, 365 U.S. 534 (1961); Townsend v. Sain, 372 U.S. 293, 320 (1963). \*/

For all of the foregoing reasons, Dykes is entitled to have the judgment against him vacated under 28 U.S.C. §2255.

\*/ The Court should also note that Dykes' application for collateral relief came only a year after the Supreme Court denied certiorari in his direct appeal. The availability of collateral relief is, as a practical matter, at least to some extent increased the closer to conviction it is sought. Bostic v. United States, 112 U.S. App. D.C. 17, 298 F. 2d 678 (1961); 115 U.S. App. D.C. 79, 317 F. 2d 143 (1963). See also the discussions in the Mapp retroactivity cases, supra, respecting the possible cut-off points for retroactivity if Mapp is held not to be completely retroactive. In Angelet v. Fay, supra, the Second Circuit, in refusing to apply Mapp retroactively, noted that Angelet's conviction was final before the illegal search involved in Mapp occurred. Dykes' case, however, had not been affirmed when Short's and Seals' inadmissible confessions -- whose introduction in the trials of the Joneses and Greenwell resulted in the reversal of their convictions -- were taken by the police. (Seals' confession taken September 25, 1961; Short's confession taken September 15, 1962; Dykes' conviction affirmed by this Court December 20, 1962). Compare Palumbo v. New Jersey, 334 F. 2d 524, 531 (3d Cir. 1964):

"To give some a guarantee but to deny it to others, merely because of a fortuitous date, would be to give some the benefit of what is considered fundamental justice but to deny it to others."

III

EVEN IF THE DISTRICT COURT HAD NO JURISDICTION UNDER 28 U.S.C. §2255 TO VACATE THE JUDGMENT OF CONVICTION, IT ERRED IN CONCLUDING THAT IT HAD NO JURISDICTION UNDER CORAM NOBIS TO VACATE DYKES' SENTENCE AND TO RESENTENCE HIM IN LIGHT OF THE EXTRAORDINARY EVENTS THAT HAVE OCCURRED SINCE HIS SENTENCE WAS IMPOSED.

On July 1, 1964, counsel for Dykes filed in the District Court a motion for a writ of error coram nobis. Counsel did so because they felt at that time that the judgment of conviction against Dykes was not vulnerable to attack and thus that a motion pursuant to 28 U.S.C. §2255 would not lie. Counsel sought, however, to obtain vacation of the sentence and resentencing in light of the events which occurred after the District Court pronounced sentence and Dykes' conviction was affirmed. It was felt that the law must provide a remedy for the obvious injustice of the situation in which Dykes was required to serve 13 to 39 years in prison while his co-defendants Coleman and Tatum, whose inadmissible confessions were introduced at Dykes' trial and who were fully protected from their use by this Court, were ultimately required to serve only 8 months to 2 years. Thus counsel moved for a writ of error coram nobis, since coram nobis has been held by the Supreme Court and this Court to be available to correct injustice where habeas corpus or §2255 will not lie. United States v. Morgan, 346 U.S.

502 (1954); Thomas v. United States, 106 U.S. App. D.C. 234, 271 F. 2d 500 (1959).

After the motion for a writ of error coram nobis was filed, but before it was argued, this Court's en banc opinion in Jones, Short and Jones, supra, was issued. In light of that opinion, and upon further consideration of the whole case, counsel concluded that a motion under §2255 to vacate the judgment of conviction would also lie. At oral argument on the coram nobis petition counsel asked the District Court to consider the petition in the alternative as a §2255 motion. The District Court refused to do so. Nevertheless, as we point out in Argument II, supra, this Court has jurisdiction to consider the §2255 merits of this case. But even if this Court concludes that Dykes is not entitled to vacation of the judgment of conviction under §2255 we submit, as we did in the District Court, that coram nobis will lie to give the District Court jurisdiction to vacate Dykes' sentence and to resentence him in light of the factual and legal events which have transpired since the District Court first imposed sentence.

The leading case of United States v. Morgan, 346 U.S. 502 (1954) re-established the validity in federal courts of the ancient writ of error coram nobis. That case states:

"In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief. . . .  
'Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.' We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of §2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion.

"Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." (Emphasis supplied). 346 U.S. at 505, 511.

In Thomas v. United States, 106 U.S. App. D.C. 234, 271 F. 2d 500 (1959), the leading coram nobis case in this Court, it is said:

"The net of the situation is that while Congress, in Sect. 2255, was affording a new remedy for post-conviction attacks on a federal sentence, no congressional purpose can be divined to exclude ancient remedies, where the new one does not reach the particular problem.

"While we, of course, intimate no views on the merits of this petition, we hold on the authority of Morgan v. United States, supra, that where a sentence is attacked on grounds outside the record under circumstances where Sect. 2255 is not available, a petitioner has rights in the nature of the rights traditionally cognizable under the common law writ of coram nobis."

The facts that were not before the Court which pronounced judgment and sentence were (1) that Coleman's and Tatum's confessions were inadmissible, and that the law does not permit conviction of defendants where co-defendants' inadmissible confessions were admitted at their joint trial; (2) that the taking and receipt into evidence of all the confessions were infected with unconstitutionality; and (3) that Coleman and Tatum, whom the trial judge plainly intended to punish equally with Dykes, were ultimately to be found not guilty of the serious offenses with which they and Dykes were charged and that they would ultimately receive sentences of 8 months to 2 years in comparison with Dykes' 13 to 39 years.

When Dykes, Coleman, and Tatum were convicted together they all received precisely the same sentence. (Jackson received a longer sentence). The District Court clearly never intended to treat them differently. Time and events, however, have undermined the District Court's

original objective. The confessions of Coleman and Tatum, which the Court admitted at the joint trial and which subjected Dykes to lengthy incarceration, have become the source of deliverance from the same lengthy incarceration for their makers, Coleman and Tatum. If the District Court had foreseen the ultimate outcome when all the defendants first came on for trial, there can be no doubt that the Court would never have permitted them to be tried together or, having permitted them to be tried together, there can be no doubt that it would not have imposed upon Dykes a sentence 20 times as severe as the sentences ultimately imposed on Coleman and Tatum. We submit that the District Court, if it does not have jurisdiction, pursuant to §2255, to vacate the judgment, at least has discretionary jurisdiction under coram nobis to vacate Dykes' sentence and resentence him, taking into account the events which transpired after sentence was originally imposed. The essence of the Morgan and Thomas cases, supra, is that where §2255 does not lie to correct a serious injustice on collateral attack, coram

nobis will lie. \*/ We therefore ask this Court to rule that the District Court has jurisdiction to vacate Dykes' present sentence and impose a new sentence, taking into account the events that have occurred since Dykes' present sentence was imposed.

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\*/ The argument of the government before the District Court at the hearing on the coram nobis petition, that §2255 is designed to afford relief to those serving the sentence attacked, and coram nobis to those not serving the sentence attacked, takes too narrow a view of both the Morgan and Thomas cases. Although in Morgan the petitioner had finished serving his sentence and in Thomas he had not begun to serve it, the cases establish the broad principle that coram nobis provides a remedy where gaps in the statutory fabric of post-conviction remedies appear. None of the language in either case necessarily limits coram nobis exclusively to those situations where the petitioner is not serving his sentence. Nor, we submit, does Rule 35, Fed. R. Cr. P., bar the District Court from resentencing Dykes in the extraordinary circumstances presented by this case, especially since the important events which were brought to its attention in the present proceeding were not before it when it first imposed sentence.

IV

UNDER THE AUTHORITY OF THE BYRD CASE, THIS COURT MAY AND SHOULD, IF IT DENIES OTHER RELIEF, RECALL ITS MANDATE AFFIRMING DYKES' CONVICTION AND REVERSE THE JUDGMENT OF CONVICTION.

In Jones, Short and Jones, Greenwell, and Johnson and Stewart, supra, this Court reversed convictions of defendants whose co-defendants' inadmissible confessions were admitted in their joint trials. Dykes was the victim of precisely the same circumstances, yet his conviction was affirmed by this Court. The injustice to Dykes of this situation is heightened by the fact that the confessions admitted at his trial were unconstitutionally taken and submitted to the jury and by the fact that the two co-defendants whose inadmissible confessions were admitted at Dykes' trial were ultimately acquitted of the offenses described in complete detail in the confessions.

This case is closely analogous to the case of Byrd v. United States, No. 12,843, D.C. Cir., by order dated March 31, 1959, judgment of this Court recalled from the District Court and case remanded with directions to the District Court to vacate its judgment and enter judgment of acquittal. Dykes stands in the same position as did Byrd in that case. Should this Court rule that Dykes is not entitled to relief under §2255, or coram nobis, we submit he is entitled to the same relief that

was given Byrd. In Byrd's case, Miller and Byrd were convicted of narcotics offenses on the basis of evidence that they alleged was seized illegally. They appealed to this Court, which affirmed their convictions in Shepherd v. United States, 100 U.S. App. D.C. 302, 244 F. 2d 90 (1956). Miller, but not Byrd, then sought certiorari. Certiorari was granted, and the Supreme Court reversed Miller's conviction on the ground that the evidence was illegally seized. (The police violated 18 U.S.C. §3109 in entering Miller's and Byrd's premises where the evidence was found). Miller v. United States, 357 U.S. 301 (1957). Byrd then sought relief in the District Court under §2255. The District Court denied relief, 166 F. Supp. 350 (D.C.D.C., 1958), but it said, at 351:

"This Court is of the opinion that where the cases were consolidated for trial, the receipt of significant illegal evidence against both defendants should not result in a prison term for one because of the inability or failure to appeal, if in that same case there is a determination of the illegality of conviction for the co-defendant. Habeas corpus was not meant to be squeezed beside the writ of error; but rather to remain broad enough to remedy manifest injustice."

Byrd appealed the denial of §2255 relief to this Court (No. 14,795). She also filed a motion in this Court in which she asked this Court to recall its judgment affirming her

conviction and to reverse the judgment of conviction. \*/  
The government opposed Byrd's motion (objection filed March 2, 1959) on the ground that this Court was without jurisdiction to recall its mandate so long after it had been presented to the District Court. Nevertheless, the Court granted the motion to recall its judgment and reversed the judgment of conviction. It dismissed the §2255 appeal as moot. \*\*/

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\*/ The judgment of this Court affirming Byrd's conviction was issued December 7, 1956. The motion to recall and reverse the judgment was filed September 11, 1959, over two years later. Here, Dykes is coming to this Court less than two years after his conviction was affirmed by it.

\*\*/ The Court's order read:

"Case No. 14,795 came on for hearing on the appeal from the denial by the District Court of a motion to vacate sentence under the provisions of Sec. 2255 and case No. 12,843 came on for hearing on the appellant's motion to recall the judgment of this court and reverse the judgment of conviction.

"In view of the decision of the Supreme Court in Miller v. U.S., 357 U.S. 301, and the fact that after that decision an order was entered in the District Court to dismiss the indictment with regard to appellant's codefendant, William Miller, and it appears [sic] that the same evidence was used in the conviction of appellant and codefendant Miller, it is

"ORDERED by the court that the judgment of this court in this case shall be recalled from the District Court and vacated and that this case is remanded to the District Court with directions to vacate its judgment and to enter a judgment of acquittal.

"It is FURTHER ORDERED by the court that a certified copy of this order shall issue to the District Court forthwith.

"In view of the foregoing, it is ORDERED that the appeal from the decision of the District Court in case No. 14,795 is dismissed as moot."

In the circumstances of this case, this Court should do no less for Dykes than it did for Byrd, if it denies Dykes relief under coram nobis or §2255. The circumstances of Dykes' case are no less extraordinary than the circumstances of Byrd's case. Dykes' case is no less closely connected to Jones, Short and Jones, Greenwell, and Johnson and Stewart, supra, than Byrd's case was connected to Miller v. United States. This Court's decision affirming Dykes' conviction was the chief reliance of the government and the dissenters in Jones, Short and Jones. It is indistinguishable from Jones, Short and Jones. It was overruled by that case. \*/ The injustice to Dykes of the trial proceedings, which is established by the record, by Jones, Short and Jones, and by the other cases and events which followed affirmance of Dykes' conviction, including the virtual acquittal of Coleman and Tatum, is injustice of the most fundamental kind. In fairness and in justice to Dykes, reversal of the Joneses' convictions should bring the reversal of Dykes' conviction, as the reversal of Miller's conviction brought the reversal of Byrd's conviction. See also, Fay v. Noia, supra, 372 U.S. at 395, n.1, which shows that the New York Court of Appeals will recall its judgments of affirmance and reverse convictions after the passage of many years in order to correct manifest

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\*/ More than that, this Court's decision affirming Dykes' conviction is sui generis. It is without ancestry or progeny. See footnote at p. 42, supra.

injustice:

"Motions to reargue appeals in the New York Court of Appeals may be made at any time . . . . After Caminito's success [in the Federal Courts on habeas corpus] Bonino [co-defendant of Noia and Caminito in state murder trial] filed a motion for reargument of his appeal in the New York Court of Appeals. The motion was granted and his conviction was also set aside and a new trial ordered on the ground that his confession had been unconstitutionally procured." \*/

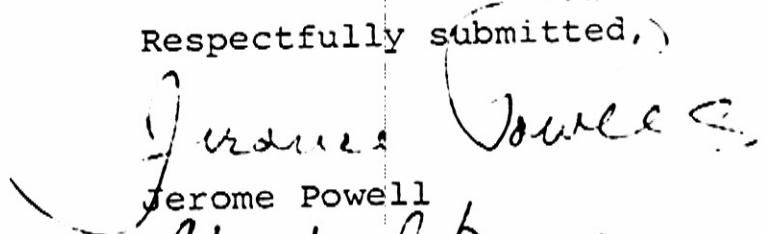
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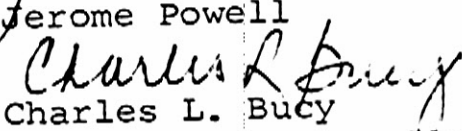
\*/ To the extent it is deemed necessary by the Court, appellant asks the Court to treat this section of his brief as a motion to recall its judgment of affirmance and to reverse the judgment of conviction in Dykes' case.

CONCLUSION

For the reasons stated, appellant respectfully requests the Court (a) to reverse the judgment of the District Court and order the District Court to vacate the judgment of conviction pursuant to 28 U.S.C. §2255, or (b) to reverse the judgment of the District Court and rule that the District Court has jurisdiction under coram nobis to vacate the sentence and resentence appellant in light of the extraordinary events that have occurred since sentence was imposed, or (c) to recall from the District Court its judgment of affirmance in appellant's direct appeal (No. 16,882), reverse the conviction, and remand the case to the District Court for a new trial.

Respectfully submitted,

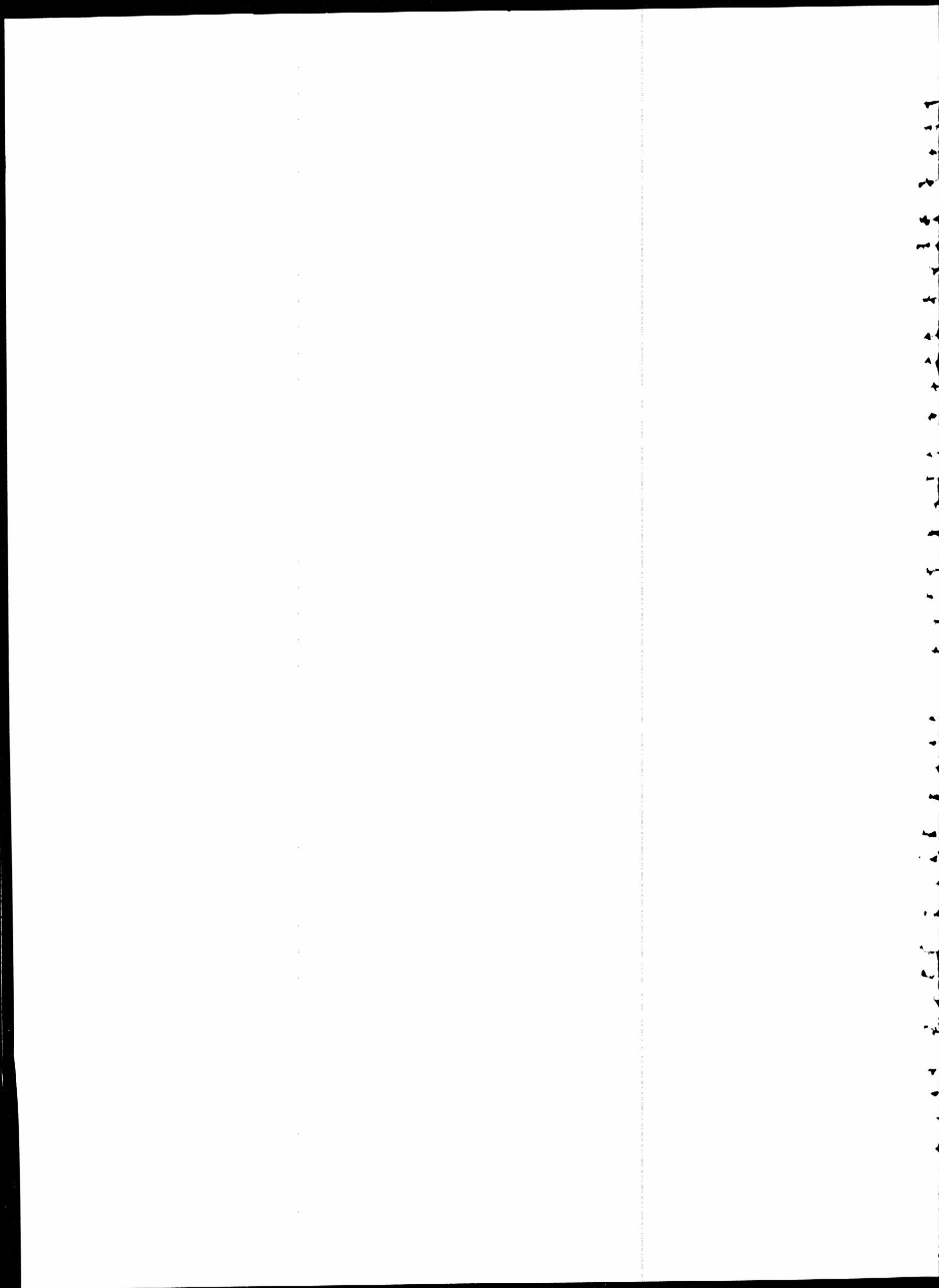
  
Jerome Powell

  
Charles L. Bucy  
Attorneys for Appellant  
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of November, 1964, personally served a copy of the foregoing Brief for Appellant upon the United States Attorney, United States Courthouse, Washington 1, D. C.

Charles L. Bucy  
Charles L. Bucy



BRIEF FOR APPELLEE

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,861

---

JAMES M. X. DYKES, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court  
for the District of Columbia

---

DAVID C. ACHESON,  
*United States Attorney.*

FRANK Q. NEBEKER,  
*Assistant United States Attorney.*

JAMES L. KELLEY,  
*Attorney, Department of Justice.*

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United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 16 1964

*Nathan J. Paulson*  
CLERK

## QUESTIONS PRESENTED

1. Whether appellant was denied the substance of a fair trial such as to entitle him to relief under 28 U.S.C. 2255.

2. Whether appellant is entitled to *coram nobis* relief in light of certain occurrences following his conviction, including the subsequent disposition of the charges against two of his co-defendants who had originally received sentences identical with appellant's and the issuance by this Court and the Supreme Court of certain decisions which, appellant contends, should apply retroactively to his case.

3. Whether, under the circumstances of this case, this Court should recall its two-year-old mandate affirming appellant's conviction, vacate its judgment of affirmance, and remand appellant's case for a new trial.

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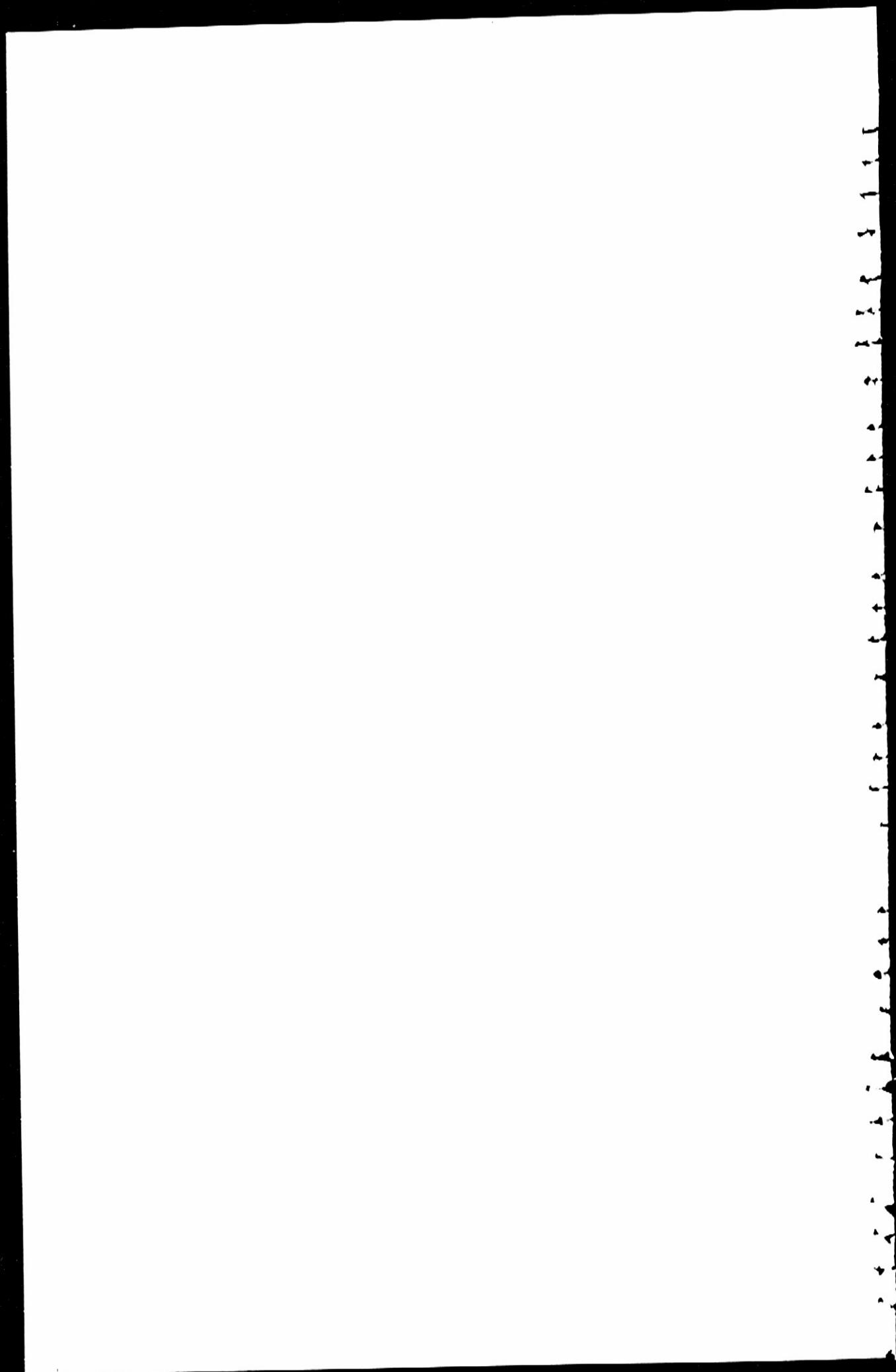
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# **United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,861

---

JAMES M. X. DYKES, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
for the District of Columbia

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BRIEF FOR APPELLEE

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## **COUNTERSTATEMENT OF THE CASE**

On the night of December 23, 1960, Victor and Fanny Schery, proprietors of a grocery store on Sheriff Road, N.E., in Washington, D. C., were accosted and robbed on Sheriff Road shortly after they closed their store. Victor Schery was shot and killed during the course of the robbery (Tr. 375-91). An automobile had been stolen the same evening and the evidence showed that it was used in the robbery (Tr. 407-13).

Appellant and three co-defendants were subsequently arrested, indicted, tried jointly and convicted of felony

murder, robbery and unauthorized use of a motor vehicle. 22 D.C. Code 2401, 2901 and 2204. A fourth co-defendant was acquitted. Prior to trial, appellant and one of the co-defendants had made a motion for severance which was denied.

The evidence adduced at the trial with respect to appellant's participation in the robbery included the following: Appellant was in the company of his co-defendant Jackson at the time of the crime (Tr. 528-530).<sup>1</sup> A short time after the robbery, appellant left Washington for New York City. He had told a friend who took him to the bus station that he was "hot" because he was involved in the Sheriff Road robbery (Tr. 573-74, 618). Appellant was subsequently arrested in New York City where he was living under an alias. At the time of his arrest, he had a pawn ticket in his possession for a pair of binoculars which had been taken from the automobile which the evidence showed was used in the robbery (Tr. 774-77).

Written post-arrest confessions of the three co-defendants who were convicted were introduced into evidence at the trial. The admission of these confessions was objected to on various grounds, including *Mallory*, coercion and prejudice to co-defendants named in the confessions. Appellant had not confessed and his name was not masked when the confessions of his co-defendants were read to the jury. However, the trial court instructed the jury that the confessions were admissible only against the declarant and that the jury was not to consider the confessions in determining the guilt of other defendants named in the confessions (Tr. 1997).

Appellant's conviction was affirmed on appeal. *Dykes v. United States*, 114 U.S. App. D.C. 189, 313 F. 2d 580 (C.A.D.C. 1962). This Court held that there was sufficient evidence to sustain the conviction and that the trial

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<sup>1</sup> Jackson made a full confession which was held admissible on appeal. *Jackson v. United States*, 114 U.S. App. D.C. 181, 313 F. 2d 572 (C.A.D.C. 1962).

court had not abused its discretion in denying appellant's motion for a severance. Appellant filed a motion for rehearing which was denied and certiorari was subsequently denied by the Supreme Court. 374 U.S. 837 (1963).

The conviction of appellant's co-defendant Jackson was likewise affirmed. *Jackson v. United States*, 114 U.S. App. D. C. 181, 313 F. 2d 572 (C.A.D.C. 1962). Jackson's contention that his confession had been obtained in violation of the *Mallory* rule was rejected. The convictions of two other co-defendants were reversed on *Mallory* grounds. *Coleman v. United States*, 114 U.S. App. D. C. 185, 313 F. 2d 576 (C.A.D.C. 1962); *Tatum v. United States*, 114 U.S. App. D.C. 188, 313 F. 2d 579 (C.A.D.C. 1962). Following the reversal of their convictions, the felony murder and robbery charges were dropped<sup>2</sup> and Coleman and Tatum pleaded guilty to unauthorized use of a motor vehicle. They received sentences of eight months to two years.

On July 17, 1963, appellant filed, *pro se*, a motion for correction or reduction of sentence under Rule 35 Fed. R. Crim. P., claiming that he had been prejudiced by the introduction of Coleman's and Tatum's confessions at the trial and that, in view of the subsequent disposition of the case against Coleman and Tatum, his sentence should be reduced to correspond with theirs. This motion was denied on July 22, 1963. Appellant subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255, alleging various errors not raised in the present proceeding. This motion was denied on January 2, 1964, and an appeal to this court was dismissed as frivolous on March 12, 1964, No. 18449.

The present proceeding was initiated by the filing of a motion, styled "Motion for Writ of Error Coram Nobis to Vacate Sentence," on July 1, 1964. The stated bases for the motion were the facts that appellant, Coleman and

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<sup>2</sup> Appellant's brief states that Coleman and Tatum were subsequently found "not guilty" (page 23) and "acquitted" (page 26) of the felony murder and robbery charges. We do not understand this to be the effect of the dismissal of an indictment.

Tatum had originally received identical sentences, which was thought to evidence the trial court's intention that the three should receive equal punishment, and that Coleman and Tatum had subsequently received lesser sentences following pleas of guilty to unauthorized use of an automobile and dismissal of the felony murder and robbery charges against them. After the motion was filed but before it was argued on July 24, 1964, this Court handed down its decision in the case of *Jones v. United States*, (C.A.D.C. Nos. 17688-92, July 16, 1964) which held that where one defendant's confession is held inadmissible on *Mallory* grounds on appeal and which implicates a co-defendant who did not confess, the convictions of both defendants must be reversed. Counsel for appellant urged that the *Jones* decision be considered as an additional factor in the availability of *coram nobis* relief, since appellant's conviction would have been reversed if *Jones* had been the law at the time of appellant's appeal.

The *coram nobis* motion was addressed to the court's discretion. Counsel for appellant conceded that the question of appellant's guilt was foreclosed in the prior appeal.<sup>3</sup> The lower court held that *coram nobis* did not lie in the circumstances presented and denied the motion. Counsel for appellant urged that in light of the *Jones* decision, the motion be treated as a motion under 22 U.S.C. 2255. This request was refused.<sup>4</sup> This appeal followed.

### SUMMARY OF ARGUMENT

Appellant was convicted in a joint trial in which confessions of three of his co-defendants which implicated him were introduced. Two of these confessions were subsequently held inadmissible on *Mallory* grounds on appeal

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<sup>3</sup> Transcript of proceedings of July 24, 1964 in the District Court Cr. No. 125-61, pp. 2, 8.

<sup>4</sup> *Id* at 8-9.

and the convictions of the declarants were reversed. It is undisputed that if appellant's conviction were presently before this Court on a direct appeal, it would be reversed on the authority of this Court's recent decision in *Jones v. United States*.<sup>5</sup> This Court held in *Jones* that where one defendant's confession is held inadmissible on *Mallory* grounds on appeal, and which implicated a co-defendant who also appeals and who did not confess, the convictions of both defendants must be reversed.

Appellant's conviction is not before this Court on direct review. On the contrary, his conviction was affirmed by this Court almost two years ago.<sup>6</sup> The present proceeding is a collateral attack and, as appellant concedes, the scope of review is limited to errors of a fundamental character. Accordingly, appellant argues that he was denied the substance of a fair trial and that he is entitled to relief under 28 U.S.C. 2255. Appellant relies most heavily on this Court's decision in *Jones v. United States* to support this argument. Appellant argues that the *Jones* rule is a rule of constitutional dimensions and that it must be deemed to operate retroactively to upset his conviction on due process grounds.

The *Jones* rule is not based on due process grounds, but rather on this Court's power to prescribe rules for the conduct of criminal trials in the United States District Court for the District of Columbia Circuit. See *McNabb v. United States*, 318 U.S. 332 (1943). Appellant's contention is belied by the language of this Court's decision in *Jones*. Moreover, this Court is not free to hold that the *Jones* rule is compelled by the due process clause in light of *Malinsky v. New York*, 324 U.S. 401 (1945). The Supreme Court in *Malinsky* sustained a state court conviction over due process objections where a co-defendant's coerced confession had been erroneously introduced at their joint trial, accompanied by limiting instructions as

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<sup>5</sup> Nos. 17688-92, decided July 16, 1964.

<sup>6</sup> *Dykes v. United States*, 114 U.S. App. D.C. 189, 313 F. 2d 580 (C.A.D.C. decided December 20, 1962).

to the petitioner. Thus *Malinsky* is a controlling precedent.

Appellant discusses certain other alleged errors relating to his co-defendants' confessions, which, combined with the *Jones* rule argument discussed above, are said to support his contention that he was denied a fair trial. None of these alleged errors was urged to the court below, so they may not be considered now. *Lampe v. United States*, 110 U.S. App. D.C. 69, 288 F. 2d 881 (C.A.D.C. 1961), *cert. denied*, 368 U.S. 958 (1962). Moreover, as to most of these issues appellant either lacks standing to raise them or it is inconceivable that he was significantly prejudiced thereby. Assuming, *arguendo*, that all of these additional contentions have substance, the *Malinsky* case, wherein the Supreme Court assumed that the co-defendant's confession was *coerced*, disposes of these contentions as to appellant.

Appellant argues alternatively that his case is an appropriate one for *coram nobis* relief. The function of the writ of *coram nobis* is to allow a convicted person to raise by collateral attack defenses based on factual matters existing at the time of trial and not brought to the attention of the trial court which, if proved, render the conviction void. See *Moon v. United States*, 106 U.S. App. D.C. 301, 272 F. 2d 530, 533, (C.A.D.C. 1959). Appellant relies for *coram nobis* relief on legally irrelevant events following his conviction. The lower court correctly held that *coram nobis* does not lie.

Finally, appellant contends that this Court should withdraw its mandate affirming his conviction if relief under 28 U.S.C. 2255 or *coram nobis* is unavailable. He relies on this Court's action in *Byrd v. United States*<sup>7</sup> where that extraordinary course was followed. *Byrd* is readily distinguishable, since appellant's conviction, unlike Byrd's, rests on competent evidence, the sufficiency of which was previously upheld by this Court. The scope of this extraordinary remedy should be narrowly confined, see

<sup>7</sup> No. 12,843, 1959.

*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944), and it should certainly not exceed the scope of habeas corpus and *coram nobis* relief. *Byrd* presented extraordinary circumstances which are not presented by the instant case. It should not be followed.

This case is similar in many respects to *West v. United States*, 217 F. Supp. 391 (D.D.C.), *aff'd*, 117 U.S. App. D.C. 90, 326 F. 2d 633 (C.A.D.C. 1963). Petitioner and a co-defendant had been convicted of a felony and sentenced to terms of five to fifteen years. The co-defendant had appealed and his conviction had been reversed because the trial judge failed to give a lesser included offense instruction. The indictment was subsequently dismissed against the co-defendant because the complaining witness was unavailable. Understandably anxious to join his co-defendant on the outside, petitioner sought relief under 28 U.S.C. 2255 for the same error. The court was sympathetic to petitioner's situation, remarking that it appeared "manifestly unfair and unjust to have a co-defendant walking the streets while the other defendant is in jail under the circumstances of this case." 217 F. Supp. at 392. However, the court felt constrained to deny the motion under the established principles governing relief under 28 U.S.C. 2255. In a per curiam affirmation, this Court stated: "Any relief to which West might be entitled in the circumstances we think must now be left to the discretion of the Executive in the exercise of the power of clemency." 326 F. 2d at 633. The same conclusion is warranted in the present case.

## ARGUMENT

### I

**The Record Conclusively Shows That Appellant Was Not Denied a Fair Trial.**

#### *Introduction*

Appellant's motion papers and the main thrust of his argument below were concerned with *coram nobis* relief.

As we shall show hereafter, the court below correctly held that *coram nobis* does not lie. The emphasis has shifted in appellant's brief on appeal. Appellant now urges most strenuously that he was denied the substance of a fair trial and that therefore his conviction is subject to collateral attack under 28 U.S.C. 2255. This contention is based on the supposed cumulative effect of the following alleged trial errors:

(1) denial of appellant's motion for severance, coupled with the admission of his codefendants' confessions, implicating him in the crime charged, which were ultimately held on appeal to be inadmissible under the *Mallory* rule;

(2) failure to exclude these confessions because they were allegedly obtained in violation of his codefendants' right to counsel;

(3) failure of the trial judge to make an independent determination as to the voluntary nature of these confessions;

(4) failure of the trial judge to instruct the jury that voluntariness was to be determined without reference to the apparent trustworthiness of the confession;

(5) withdrawal from the jury of the issue of fact as to whether the codefendants had actually confessed.

The issue is a narrow one and can be precisely stated. It is undisputed that two of the three confessions of appellant's co-defendants which implicated appellant and which were erroneously admitted at their joint trial, were inadmissible on *Mallory* grounds. This Court recently held in *Jones v. United States*<sup>8</sup> that where one defendant's confession is held inadmissible on *Mallory* grounds on appeal, and which implicated a co-defendant who did not confess, the convictions of both defendants must be reversed. *Jones* holds that limiting instructions are inadequate to protect the interests of the defendant who does not confess. Thus it is clear that if appellant's case were before this Court on direct appeal, *Jones* would re-

<sup>8</sup> *Jones v. United States*, C.A.D.C. Nos. 17688-92 (1964).

quire the reversal of his conviction. However, appellant's case is not here on direct review. It is here on collateral attack and the scope of review on a collateral attack is limited to errors of a fundamental character. The issue is whether the rule announced in *Jones* is an ordinary procedural rule or whether the rule is necessitated by due process. If it is a mere procedural rule, as we contend, then the trial court did not err in proceeding as it did at appellant's trial and there is no basis for collateral attack. If, as appellant contends, the *Jones* rule is based on the due process clause, then, arguably, it might be deemed to operate retroactively to vitiate the proceedings which led to appellant's conviction. As we shall show, controlling Supreme Court precedents as well as the language of this Court's decision in *Jones* make it clear that the *Jones* rule does not, indeed could not, be based on the due process clause.

***General Principles Governing Relief under 28 U.S.C. 2255.***

It is well settled that a conviction is not subject to collateral attack unless "a fundamental defect which inherently results in a complete miscarriage of justice . . . [or] an omission inconsistent with the rudimentary demands of fair procedure" is shown. *Hill v. United States*, 368 U.S. 424, 428; see *Fay v. Noia*, 372 U.S. 391, 423 (1963).<sup>9</sup> If the proceedings are infected by such a fundamental error, the judgment of conviction is not merely erroneous, but void, and the principle of res judicata is accordingly inapplicable. See *Darr v. Burford*, 339 U.S. 200, 214 (1950); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924). But if the proceedings were fundamentally fair and regular, mere errors of law are an insufficient basis for collateral attack even if they would have required

<sup>9</sup> The scope of relief available to a federal prisoner proceeding under 28 U.S.C. 2255 is coextensive with that formerly available pursuant to the habeas corpus statute, 28 U.S.C. 2241. See *Hill v. United States*, 368 U.S. 424, 427 (1962); *United States v. Hayman*, 342 U.S. 205, 217 (1952); *Gaitan v. United States*, 317 F. 2d 494, 495 (C.A. 10, 1963).

a reversal on appeal. *Sunal v. Large*, 332 U.S. 174 (1947); *Smith v. United States*, 88 U.S. App. D.C. 80, 187 F. 2d 192 (C.A.D.C. 1950), *cert. denied*, 341 U.S. 927 (1951); *West v. United States*, 217 F. Supp. 391 (D.D.C.), *aff'd*, 117 U.S. App. D.C. 90, 326 F. 2d 633 (C.A.D.C. 1963). The rule applies even if the errors relate to constitutional rights, see *United States v. Allocco*, 305 F. 2d 704, 707 n. 8 (C.A. 2, 1962), *cert. denied*, 371 U.S. 964 (1963); *Hodges v. United States*, 108 U.S. App. D.C. 375, 282 F. 2d 858 (C.A.D.C. 1960), *cert. dismissed as improvidently granted*, 368 U.S. 139 (1961); *Smith v. United States*, *supra* at 197. And this is particularly true where the petitioner was represented by counsel, the matters on which the alleged errors are based were known at the time of trial, and the applicable law was clear. See *United States v. Rosenberg*, 200 F. 2d 666 (C.A. 2 1952), *cert. denied*, 345 U.S. 965 (1953); *United States v. De Fillo*, 166 F. Supp. 627 (S.D.N.Y. 1958).<sup>10</sup>

*A fortiori*, errors in trial procedure or in the admission of evidence are not a basis for collateral attack. *United States v. Heinecke*, 209 F. Supp. 526 (D.D.C. 1962), *aff'd*, 115 U.S. App. D.C., 34, 316 F. 2d 685 (C.A.D.C. 1963); *West v. United States*, *supra*. Such issues are res judicata in collateral proceedings, whether or not they were previously raised on appeal. *Gaitan v. United States*, *supra* at 295; cf. *Chicot County Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940).

The federal courts have, in recent years, drastically expanded the procedural protections for accused persons in criminal trials. Where the new rule rests on constitutional grounds, it has sometimes been applied retroactively in collateral proceedings if it goes to the essential fairness

<sup>10</sup> As the court said in *De Fillo*: "The necessity of such a rule is self-evident. All semblance of finality would disappear from our system of criminal trials if defendants were permitted to apportion their arguments so that point "A" will be used at the trial, point "B" held back for use on appeal and finally point "C", an allegation of violation of rights, jealously guarded from the eyes of the trial and appellate courts for a final try under § 2255." *United States v. De Fillo*, *supra* at 629. See also, *Fay v. Noia*, *supra* at 439.

of the trial. See, e.g., *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963); *Farnsworth v. United States*, 98 U.S. App. D.C. 59, 232 F. 2d 59 (C.A.D.C. 1956). But even decisions resting on constitutional grounds are not, ipso facto, retroactive. *Chicot County Dist. v. Baxter State Bank*, *supra*; *Sisk v. Lane*, 331 F. 2d 235 (C.A. 7, 1964) (*Mapp* rule held not retroactive); *United States v. Walker*, 323 F. 2d 11 (C.A. 5, 1963) (same).

When the new rule does not rest on constitutional grounds, countervailing considerations prevail. For example, when an accused person is convicted under an established and valid construction of substantive law, a change in the law brought about by judicial construction in another case affords no basis for a collateral attack. *Warring v. Colpoys*, 74 U.S. App. D.C. 303, 122 F. 2d 642 (C.A.D.C.), *cert. denied*, 314 U.S. 678 (1941), decided by this Court in 1941, is one of the leading cases on the point. Judge (later Chief Justice) Vinson stated the problem and the rule in the following trenchant terms:

We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The *Nye* case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then, is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should conclude that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be downright chaotic. 122 F. 2d at 647.<sup>11</sup>

<sup>11</sup> The *Warring* rule was followed by this Court in *Meyers v. United States*, 86 U.S. App. D.C. 320, 181 F. 2d 802 (C.A.D.C.) *cert. denied*, 339 U.S. 983 (1950).

As noted above, procedural errors, unless they vitiate the fundamental fairness of the proceeding, may not be raised in a collateral attack; it follows ineluctably that judicial decisions which change procedural rules on other than constitutional grounds afford no retroactive basis for a collateral attack. *United States v. Sobell*, 314 F. 2d 314 (C.A. 2), *cert. denied*, 374 U.S. 857 (1963); *United States v. Gandia*, 255 F. 2d 454 (C.A. 2, 1958); *Collins v. Webb*, 133 F. Supp. 877 (N.D. Cal. 1955). For example, an argument substantially similar to the argument advanced by appellant with respect to the *Jones* rule was rejected in *United States v. Hodges*, 156 F. Supp. 313 (D.D.C. 1957) with respect to the *Mallory* rule.<sup>12</sup>

#### ***Non-Constitutional Basis of the Jones Rule.***

Appellant's reliance on this Court's decision in *Jones* must be examined in the perspective of the foregoing principles. It is clear beyond argument that this Court's decision in *Jones* was necessarily based on this Court's supervisory power to formulate rules for the conduct of criminal trials in the trial courts of this Circuit and not on the due process clause. See *McNabb v. United States*, 318 U.S. 332 (1943).<sup>13</sup> *Malinsky v. New York*, 324 U.S. 401 (1945) completely disposes of the question. The Supreme Court in *Malinsky* sustained a state court conviction over due process objections where a co-defendant's coerced confession had been erroneously introduced at

<sup>12</sup> *Hodges* holds that the *Mallory* rule is not constitutionally founded and that accordingly a pre-*Mallory* conviction based on a confession obtained during a period of unreasonable delay before arraignment is not subject to collateral attack on that ground.

<sup>13</sup> It should be noted that prior to *Jones*, the procedure followed in appellant's trial, at least where the confessions were admissible against the confessor, was consistently approved by this Court. See, e.g., *Robinson v. United States*, 93 U.S. App. D.C. 347, 210 F. 2d 29 (C.A.D.C. 1954); *Hall v. United States*, 83 U.S. App. D.C. 166, 168 F. 2d 161 (C.A.D.C.), *cert. denied*, 334 U.S. 853 (1948); *Lucas v. United States*, 70 U.S. App. D.C. 92, 104 F. 2d 225 (C.A.D.C. 1939). None of these decisions contains the slightest suggestion that constitutional considerations might be involved.

their joint trial, accompanied by limiting instructions as to the petitioner. This principle was reaffirmed in *Stein v. New York*, 346 U.S. 156, 194 (1953)<sup>14</sup> and has been consistently adhered to by the lower federal courts.<sup>15</sup> Although *Malinsky* involved a state prosecution, as to questions of fundamental procedural fairness in criminal trials, the scope of the due process clause of the Fourteenth Amendment is coextensive with the due process clause of the Fifth Amendment. Cf. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Since *Malinsky* is a controlling precedent, this Court is not free to hold that the *Jones* rule is compelled by the due process clause.

The *ratio decidendi* of this Court's decision in *Jones* is wholly consistent with the conclusion that *Malinsky* controls and wholly inconsistent with appellant's argument that *Jones* is a rule of constitutional dimensions:

In *Anderson v. United States* the Supreme Court held that admission in evidence of illegally obtained confessions of some defendants vitiated the convictions of all. One ground of the decision was that the judge's charge allowed the jury "to assume that in ascertaining the guilt or innocence of each defendant they could consider the whole proof made at the trial." 318 U.S. 350, 356-7 (1943). But in the later case of *Malinski v. New York*, 324 U.S. 401 (1945), in sustaining a state court conviction where a co-defendant's coerced confession had been introduced at a joint trial, the Supreme Court distinguished *Anderson* primarily on the ground that it dealt with "a criminal proceeding

<sup>14</sup> The portion of the opinion in *Stein* which sustained the New York procedure for determining the voluntariness of an allegedly coerced confession was overruled in *Jackson v. Denno*, 378 U.S. 368 (1964) but the portion of the *Stein* opinion which reaffirms *Malinsky* was not involved in *Jackson*.

<sup>15</sup> See, e.g., *United States v. Yeager*, 327 F. 2d 311, (C.A. 3, 1963); *Giron v. Cranor*, 116 F. Supp. 92 (E. D. Wash. 1953). Moreover, *Malinsky* was cited in this connection in this Court's affirmance of appellant's conviction. *Dykes v. United States*, 313 F. 2d at 581 n.1.

in a federal District Court over which we have more control than we do over criminal trials in the state courts", and only secondarily ("Moreover") on the ground that it involved an erroneous instruction to the jury. 324 U.S. 401, 411, 412 (1945). Since the present appeals, like *Anderson*, involve "a criminal proceeding in a federal District Court", the co-defendants' convictions should be reversed as in *Anderson*, not affirmed as in *Malinski*.

If further proof is needed that the *Jones* rule is not constitutionally required, it may be derived from *Delli Paoli v. United States*, 352 U.S. 232 (1957). In *Delli Paoli*, the Supreme Court sustained a federal conviction where an *admissible* confession of a co-defendant which implicated the petitioner had been admitted in evidence with limiting instructions as to the petitioner. *Delli Paoli* was distinguished by this Court in *Jones* principally on the ground that the confession in *Jones* was inadmissible on *Mallory* grounds. However, the issue of the admissibility of a confession on *Mallory* grounds has, as a practical matter, no bearing whatever on the degree to which a defendant is prejudiced by the admission of a co-defendant's confession at a joint trial. The due process principle which appellant so earnestly asserts must spring, if at all, from the problem of prejudice and not from the policies underlying *Mallory*. Accordingly, *Delli Paoli* is certainly germane to the question of whether the *Jones* rule is based on the due process clause. Both the opinion for the Court and the dissenting opinion in *Delli Paoli* are barren of any suggestion that the *Delli Paoli* rule carries constitutional implications. Appellant's reliance on *Jackson v. Denno*, 378 U.S. 232 (1964) to support a contrary conclusion is misplaced.<sup>16</sup>

<sup>16</sup> Appellant argues that *Jackson* overrules *Delli Paoli* on due process grounds (Appellant's brief at 43-45). This is impossible since the issues involved in the two cases are almost totally dissimilar. *Jackson* holds that due process requires an independent determination of the voluntariness of a confession. *Delli Paoli* holds that an *admissible* confession of a co-defendant which implicates

***The Remaining Contentions in Support of Relief Under 28 U.S.C. 2255.***

Appellant does not rely exclusively on the alleged retroactive effect of the *Jones* rule in support of his argument that he was denied the substance of a fair trial. He seeks to buttress this conclusion by the additional contentions numbered (2) through (5) above. There are two short answers to all these contentions.

First, these contentions may not be considered by this Court because they were not urged before the court below. It is the settled rule of this Court on review of a denial of a motion under 28 U.S.C. 2255 that issues not raised below may not be considered on appeal. *Lampe v. United States*, 110 U.S. App. D.C. 69, 288 F. 2d 881 (C.A.D.C. 1961), *cert. denied*, 368 U.S. 958 (1962); *Plummer v. United States*, 104 U.S. App. D.C. 211, 260 F. 2d 729 (C.A.D.C. 1958). Appellant's motion papers and the transcript of the proceedings below contain no reference whatever to these additional contentions.

Second, all of these contentions concern alleged errors in the taking of appellant's co-defendants' confessions and the submission of these confessions to the jury. The *Malinsky* case, which, as we have shown, is dispositive of appellant's argument based on the *Jones* case, is completely dispositive of all of these contentions as well. Assuming, *arguendo*, that appellant's co-defendants' confessions were coerced, *Malinsky* precludes relief for appellant under 28 U.S.C. 2255, because the prejudice to appellant

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the defendant may be introduced at their joint trial if the jury is instructed that the confession may be considered as evidence only against the confessor. Thus, *Delli Paoli* has nothing to do with the voluntariness of a confession, an issue which has been traditionally regarded as crucial to the fairness of criminal trials. Justice White's opinion for the Court in *Jackson* cited Justice Frankfurter's dissenting opinion in *Delli Paoli* merely to illustrate prior judicial recognition of the obvious difficulties jurors have in considering highly prejudicial evidence for limited purposes. Justice Harlan, in a dissenting opinion in *Jackson* argued that the Court's rationale was inconsistent with prior decisions which reflect greater confidence in the ability of the jury to understand and apply complex instructions, citing *Delli Paoli* as an outstanding example.

which might have been caused by these additional alleged errors falls far short of the prejudice which would result if the confessions were in fact coerced, as in *Malinsky*.

Nevertheless, we will deal with each of these contentions briefly, since it can be readily shown that they are without merit.

*The Right to Counsel Argument.* Appellant urges the confessions were inadmissible because they were obtained in violation of his co-defendants' Sixth Amendment rights to counsel *and that he was prejudiced thereby*. It is by no means clear that the confessions of appellant's co-defendants were obtained in violation of their Sixth Amendment rights to counsel. See *Jackson v. United States*, (C.A.D.C. No. 17746, 1964); *Feguer v. United States*, 302 F. 2d 214 (C.A. 8), *cert. denied*, 371 U.S. 872 (1962) (right applies only after indictment or information), but pursuit of this question is unnecessary. Assuming for present purposes that the confessions were obtained in violation of appellant's co-defendants' rights to counsel, appellant has no standing to raise this objection. *Cf. McAlister v. Henkel*, 201 U.S. 90, 91 (1906); *United States v. Sobell*, *supra* at 323; *Sachs v. Government of the Canal Zone*, 176 F. 2d 292 (C.A. 5), *cert. denied*, 338 U.S. 858 (1949);<sup>17</sup> *Remus v. United States*, 291 Fed. 501, 511 (C.A. 5 1923). Moreover, since violation of the right to counsel does not go to the reliability of the confession, it is inconceivable that appellant was additionally prejudiced by this alleged error.

*The Jackson v. Denno Argument.* Appellant points out that the court failed to make an independent determination of the voluntary nature of the confessions and argues

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<sup>17</sup> In *Sachs*, the Court said:

It was never heard that a defendant could object to the violation of the privileges of others not claimed by them because that violation discovers evidence by which he is convicted . . . . Assuming, without deciding, that the district attorney's action was an invasion of rights of Mrs. Harewood, which she could have claimed, it was not, it could not have been, an invasion of defendant's rights. *Sachs v. Government of the Canal Zone*, *supra* at 296.

that this failure was fatal under *Jackson v. Denno*, 378 U.S. 368 (1964). In the instant case, the court held a hearing out of the presence of the jury on the question of the admissibility of the confessions and declined to rule that the confessions were inadmissible as a matter of law on the evidence presented. The court found that there was a disputed issue of fact as to voluntariness and submitted the question to the jury. This is the procedure previously approved in *Stein v. New York*, 346 U.S. 156 (1953) and previously followed in the District of Columbia and several other jurisdictions. See *Wright v. United States*, 102 U.S. App. D.C. 36, 250 F. 2d 4, 13 (C.A.D.C. 1957) and cases therein cited; *Jackson v. Denno*, *supra* at 414 (dissenting opinion of Black, J.). We agree that the procedure followed by the trial court in resolving the issue of the voluntariness of the confessions was unconstitutional under *Jackson v. Denno*.<sup>18</sup> Having established this much, appellant concludes that he was unfairly prejudiced. This is an egregious *non sequitur*. Appellant did not confess and the fact that the procedure employed to determine the voluntariness of his co-defendants' confessions is deemed invalid retrospectively under *Jackson v. Denno* certainly does not support the conclusion that the confessions were actually coerced. The *Malinsky* case bars this contention even if the confessions were in fact coerced. It necessarily follows that appellant is entitled to no relief since the defect is not actual coercion (which was assumed in *Malinsky*) but a procedural error (retrospectively viewed) in determining this question.

*The Standard of Voluntariness Argument.* Appellant contends that the trial court failed to instruct the jury that they were to determine the issue of voluntariness without regard to the apparent truth or falsity of the confessions. See *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961). The court's instructions to the jury, considered as a whole, are not subject to criticism on this score. The

<sup>18</sup> Moreover, the rule has been applied retroactively in a collateral proceeding. *McMerlin v. Denno*, 378 U.S. 575 (1964).

court's instructions in this regard were lengthy and included the following statement:

Consequently, ladies and gentlemen of the jury, if you find that any of the alleged confessions were a result of any physical force or any threat, promise, duress, coercion, or misrepresentation, or undue influence, you must disregard such confession or confessions.

Unlike the argument discussed above based on *Jackson v. Denno*, the law on this question was clear at the time of trial. See *Rogers v. Richmond*, *supra*; *Lisenba v. California*, 314 U.S. 219, 236 (1941). Appellant was represented by able counsel both at the trial and on appeal and no objection was made on this point. It is too late now. Cf. *Fay v. Noia*, *supra* at 439. Moreover, like the "right to counsel" argument, this contention manifestly does not go to the truth of the confessions and therefore appellant cannot claim that there was any additional prejudice to him.

*The Invasion of the Province of the Jury Argument.* Finally, appellant argues that the court took the issue of coercion away from the jury by instructing them that:

These statements were made and signed by the defendants while in the custody of the police.  
(Tr. 1992)

This contention is frivolous. All three of appellant's co-defendants' who confessed testified that they had signed the written confessions which were introduced in evidence while in the custody of the police.<sup>19</sup> The only dispute about the confessions was whether they were the product of coercion. The quoted language stated facts about which there was no dispute and served as a preface for the court's instructions to the jury as to their resolution of the issue of coercion. *Hardy v. United States*, (C.A.D.C. No. 18513, 1964) lends no support whatever to this obviously manufactured contention.

<sup>19</sup> See Tr. 1659, 1683 (*Jackson*); 1791, 1806 (*Tatum*); 1738, 1752 (*Coleman*).

## II

**Coram Nobis Lies To Correct Errors Of a Fundamental Character Based On Facts Outside The Record Which, If Presented At The Trial, Would Have Required a Different Result. The Lower Court Correctly Held That Coram Nobis Does Not Lie To Equalize Disparities In Sentences Of Co-defendants Arising Out Of Events After The Trial.**

Appellant urged below that the court had discretion to grant *coram nobis* relief to vacate or modify his sentence. His argument was based entirely on occurrences subsequent to his conviction: (a) the fact that two of his co-defendants, who had received the same sentences as appellant, had had their convictions reversed on *Mallory* grounds and that subsequently they had pleaded guilty to a lesser charge for which they received lesser sentences; (b) the fact that this Court, in the *Jones* case, departed from its prior rulings and held that where a defendant is implicated by a co-defendant's confession which is held inadmissible on appeal, limiting instructions are inadequate and his conviction must be reversed as well as his co-defendant's. Appellant completely misconceives the nature and purpose of the writ of *coram nobis*.

The function of the writ of *coram nobis* is to allow a convicted person to raise by collateral attack defenses based on factual matters not brought to the attention of the trial court through no fault of his and which, if proved, render the conviction void. See *United States v. Morgan*, 346 U.S. 502 (1954); 7 Moore, Federal Practice at 47 (1955). The scope of relief is similar to that of habeas corpus and under 28 U.S.C. 2255 in that only errors of a "fundamental character" may be raised in *coram nobis* proceedings. See *United States v. Morgan*, *supra*, at 512; *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). The writ lies when, for technical reasons, habeas corpus or § 2255 relief is unavailable.<sup>20</sup> In the typical case, the writ may

<sup>20</sup> For example, habeas corpus and § 2255 relief do not lie unless the petitioner is presently in custody under the conviction he is attacking. See *Morgan v. United States*, *supra*.

issue where the defendant was not represented by counsel and he alleges that his plea of guilty was coerced. See, e.g., *Farnsworth v. United States*, 98 U.S. App. D.C. 59, 232 F. 2d 59 (C.A.D.C. 1956); *Shelton v. United States*, 242 F. 2d 101 (C.A. 5, 1957) *rev'd on other grounds on rehearing en banc*, 246 F. 2d 571, *rev'd on confession of error by Solicitor General*, 356 U.S. 26 (1958). *Thomas v. United States*, 106 U.S. App. D.C. 234, 271 F. 2d 500 (C.A.D.C. 1959), on which appellant relies, is such a case. Obviously, such an issue usually may not be resolved from the record and, if proved, would render the conviction void. These cases support the principle that the factual matters on which the defense is based must have occurred prior to the entry of judgment.<sup>21</sup> Accordingly, it has been held that alleged errors in sentencing may not be raised in *coram nobis* proceedings. *United States v. Bateman*, 277 F. 2d 65 (C.A. 8 1960); *State v. Campbell*, 307 S.W. 2d 486 (Md. 1957); *People v. Lyle*, 21 Cal. App. 2d 132 (1957).

The purposes and limitations of the writ were recently restated by this Court in *Moon v. United States*, 106 U.S. App. D.C. 301, 272 F. 2d 530 (C.A.D.C. 1959) in the following terms:

It is enough to note that the function of the writ was primarily to correct errors of fact on the part of the trial court, not attributable to the negligence of the defendant, when the errors alleged are "of the most fundamental character; that is such as rendered the proceeding itself irregular and invalid." (citing cases) Usually, if not always, such errors of fact are not apparent on the face of the record, and were unknown to the trial court. Usually, too, the litigant must present a case so strong that "action to achieve

<sup>21</sup> Indeed, this principle is practically self-evident. It is difficult to conceive of a situation where developments following a conviction could render a conviction void, other than a subsequent decision of the Supreme Court which is deemed so fundamental that it is applied retroactively.

justice" is compelled. . . . But relief of that sort will not ordinarily be granted "to correct errors committed in the course of trial, even though such errors relate to constitutional rights." (citing cases). And this is particularly true where petitioner was represented by counsel at trial.

Application of these principles to the instant case conclusively shows that appellant is not entitled to *coram nobis* relief.

### III

#### **This Court Should Not, Under The Circumstances Presented, Withdraw Its Mandate Affirming Appellant's Conviction.**

Appellant argues that if relief may not be granted under 28 U.S.C. 2255 or *coram nobis*, this Court should withdraw its mandate and vacate its judgment affirming appellant's conviction. Appellant relies on this Court's decision in *Byrd v. United States*, (C.A.D.C. No. 12, 843 1959). There are three answers to this argument:

(1) This Court may not consider this argument because it was not urged before the court below. *Lampe v. United States, supra*.

(2) The *Byrd* case is distinguishable. As the district court in *Byrd* said in denying relief under 28 U.S.C. 2255:

Here the illegal evidence was the crux of the case not only against Miller [a co-defendant] but also as against this petitioner [Byrd]. *Byrd v. United States*, 166 F. Supp. 350, 351 n.1 (D.D.C. 1958).

The district court went on to distinguish the case from *Upshaw v. United States*, 102 U.S. App. D.C. 299, 252 F. 2d 863 (C.A.D.C.), *cert denied*, 357 U.S. 939 (1958), where relief under 28 U.S.C. 2255 was denied on the alternative ground that additional and sufficient evidence supported petitioner's conviction, unlike the conviction of a co-defendant which had been reversed on appeal.

Appellant was not convicted by illegal evidence. The trial judge clearly instructed the jury to disregard the confessions of appellant's co-defendants in determining his guilt. This Court has already held that there was sufficient evidence to sustain his conviction. Moreover, in *Byrd*, the district court stressed the fact that "in the same case there is a determination of the illegality of conviction for the co-defendant (emphasis by the court)." *Byrd v. United States, supra*. Appellant's efforts to show that his case and the *Jones* case are "no less closely connected" is not persuasive.

(3) Recall of the mandate is inappropriate under established principles. Prior to 1948, the general rule in the federal courts was that mandates could not be recalled or judgments set aside following the expiration of the term in which they were finally entered. See *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). The rule applied to criminal as well as civil cases. *United States v. Mayer*, 235 U.S. 55, 67 (1914). A narrow exception was recognized in cases involving fraud and where the enforcement of the judgment would have been "manifestly unconscionable." Cf. *Pickford v. Talbott*, 225 U.S. 651, 657 (1912).

The rule was modified by the adoption of 28 U.S.C. 452 in 1948, which provides that the expiration of a session of court does not affect the power of the court "to do any act or take any proceeding." See *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 198 F. 2d 927 (C.A. 1952). However, the circumstances under which mandates should be withdrawn after a substantial period of time are still governed by the principles enunciated in the *Hazel Atlas* case and these principles foreclose relief in the instant case. See *Hines v. Royal Indemnity Co.*, 253 F. 2d 111 (C.A. 6 1958). Surely the scope of relief for this extraordinary remedy should be no broader than relief under 28 U.S.C. 2255 or *coram nobis*. Otherwise, the compelling policies which limit the scope of these remedies would be frustrated.

We have found no decisions substantially similar to this Court's decision in the *Byrd* case and appellant has cited none. *Byrd* presented extraordinary circumstances not present in the instant case; it should not be followed.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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*United States Attorney.*

FRANK Q. NEBEKER,  
*Assistant United States Attorney.*

JAMES L. KELLEY,  
*Attorney, Department of Justice.*

REPLY BRIEF FOR APPELLANT

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IN THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

No. 18,861

JAMES M. X. DYKES,  
APPELLANT

v.

UNITED STATES OF AMERICA,  
APPELLEE

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals  
for the District of Columbia Circuit

FILED JAN 8 1965

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CLERK

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UNITED STATES COURT OF APPEALS  
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Appellant

v.

UNITED STATES OF AMERICA,  
Appellee

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APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF FOR APPELLANT

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We respectfully submit that all the government's arguments are answered in appellant's main brief. But we think the following comments on specific parts of the government's brief may be helpful to the Court.

The government concedes that this Court's en banc decision in Jones, Short and Jones v. United States establishes the unjustness of Dykes' conviction. \*/ But the government tells the Court that the Court is helpless to do anything about it. It says that although the limiting instructions which accompanied the admission into evidence of some of the inadmissible confessions of his co-defendants were "inadequate to protect [Dykes] interests," a "mere procedural rule" (Br. 9) was involved, and a "mere error of law" (Br. 9) was committed, and that therefore Dykes cannot secure collateral relief from his conviction. But the events recounted and discussed at pp. 4-10 and 21-36 of appellant's brief show that "mere" is an inadequate word, to say the least, to describe the error and the prejudice to Dykes of the admission into evidence at his trial of his

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\*/ The exact words of the government's concession are (Br. 8-9): "This Court recently held in Jones v. United States that where one defendant's confession is held inadmissible on Mallory grounds on appeal, and which implicated a co-defendant who did not confess, the convictions of both defendants must be reversed. Jones holds that limiting instructions are inadequate to protect the interests of the defendant who does not confess. Thus it is clear that if appellant's case were before this Court on direct appeal, Jones would require the reversal of his conviction."

co-defendants' inadmissible confessions. \*/ The government

\*/ The government attempts to magnify the very weak case which, absent the co-defendants' confessions, it had against Dykes. (Br. 2). Appellant's brief, at pp. 25-27, shows just how weak that case was. The government says that the evidence showed that Dykes "was in the company of his co-defendant Jackson at the time of the crime." It would have been more accurate to say "on the night of the crime" rather than "at the time of the crime". Also contrary to the government's assertion no competent evidence against Dykes showed that the binoculars found in Dykes' possession came from the car used in the crime. Only the confessions of the co-defendants linked the car to the crime.

The government follows its assertion that Dykes "was in the company of his co-defendant Jackson at the time of the crime" with a footnote assertion that "Jackson made a full confession which was held admissible on appeal." Does it mean thereby to suggest that the admission of one admissible confession vitiated the prejudice arising from the admission of two inadmissible ones, or that the prejudice to Dykes arising from Jackson's confession is tolerable? We again call to the Court's attention the fact that the jury acquitted the co-defendant Washington who was named only in Jackson's "admissible" confession. (Appellant's brief, pp. 24-25). And we reiterate that recent cases in the Supreme Court and this Court (a) overrule Delli Paoli v. United States, which upheld the conviction of a defendant whose co-defendant's admissible confession was introduced at their joint trial, (b) establish the retroactive inadmissibility of Jackson's confession on right to counsel grounds, and (c) also establish that Jackson's confession was erroneously admitted, as the government concedes (Br. 17), because the trial judge did not make an independent determination of its voluntariness before he admitted it. (Appellant's brief, pp. 28-35, 43-45).

The government chides appellant (Br. 3) for asserting that Coleman, who was released from prison December 11, 1964, and Tatum, who was released November 20, 1964, were "acquitted" and found "not guilty" of murder and robbery when those charges against them were dropped. But it is perfectly clear, and the government does not assert the contrary, that the charges against Coleman and Tatum were dropped for no other reason than the fact that the government could not prove by competent evidence that they were guilty of those crimes. The government cannot now be heard to assert that they are guilty.

concedes that if Dykes was "denied the substance of a fair trial," or deprived of due process by these events, he is entitled to vacation of his sentence. \*/ We submit that these phrases are virtually meaningless if they do not encompass this case.

The government says that the Supreme Court's decision in Malinski v. New York precludes this Court from finding that the Jones, Short and Jones decision was based on due process grounds, or that Dykes was denied due process. The government's view is erroneous. In Malinski v. New York, several of Malinski's confessions were introduced at Malinski's and Rudish's joint trial. The Supreme Court ruled that one of these confessions was coerced and that its admission required

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\*/ The concession is found in the government's statement of the first question presented, "whether appellant was denied the substance of a fair trial such as to entitle him to relief under 28 U.S.C. 2255," and in these words at p. 9 of its brief: "If, as appellant contends, the Jones rule is based on the due process clause, then, arguably, it might be deemed to operate retroactively to vitiate the proceedings which led to appellant's conviction. . . . It is well settled that a conviction is not subject to collateral attack unless 'a fundamental defect which inherently results in a complete miscarriage of justice . . . [or] an omission inconsistent with the rudimentary demands of fair procedure' is shown. . . . If the proceedings are infected by such a fundamental error the judgment of conviction is not merely erroneous, but void, and the principle of res judicata is accordingly inapplicable."

reversal of Malinski's conviction. In refusing to reverse Rudish's conviction, the Supreme Court deferred to the state, 324 U.S. at 410-412, \*/ which gave Rudish a new trial. 294 N.Y. 500, 63 N.E. 2d 77; Stein v. New York, 346 U.S. at 194. The Supreme Court did not thereby necessarily hold that Rudish's conviction was consonant with due process; much less did it hold that due process permits the conviction of every non-confessing defendant, state or federal, who is subjected to a trial in which his co-defendants' inadmissible confessions are introduced. Nor did the Court hold that under no circumstances was there a way for a federal court collaterally to rectify admittedly erroneous federal convictions. See the opinion of Judge Fahy in Hodges v. United States, 108 U.S. App. D.C. at 382, 282 F.2d at 865, approved by the full Court at 108 U.S. App. D.C. 376, 282 F.2d 859:

"It would seem clear that a failure to appeal from a conviction does not always save it from collateral attack on a

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\*/ Unlike Dykes, Rudish did not seek severance. With his counsel's "complete approval" "X" was substituted for Rudish's name in the confession which named him when it was read to the jury. As we have noted, (appellant's brief, pp. 6-7, 22), Dykes' name appeared and was reported to the jury 84 times in Coleman's and Tatum's confessions. It appeared and was reported to the jury 46 times in Jackson's confessions. (Tr. 1600-1609, 1482-1484, 1545-1548). Dykes was repeatedly referred to by pronouns in all these confessions.

constitutional ground, or indeed on other ground where the court is convinced justice requires a remedy, though sought collaterally. In other words, the Great Writ, and section 2255, are not to be imprisoned within an iron-clad rule stated in terms of collateral relief not being a substitute for an appeal." (Emphasis added). \*/

In any event, Malinski was decided in 1945, and even if it could be said to go as far as the government says it does,

\*/ The government, asserting that Malinski rules that due process could not be violated when a co-defendant's inadmissible confession implicating the defendant is introduced at their joint trial, states that "[t]his principle was reaffirmed in Stein v. New York, 346 U.S. 156, 194 (1953), and has been consistently adhered to by the lower federal courts," citing two cases, United States v. Yeager, 327 F. 2d 311 (3d Cir. 1963), and Giron v. Cranor, 116 F. Supp. 92 (E.D. Wash. 1953). The "[reaffirmation]" of this "principle" in Stein was dictum. Yeager and Giron both involved habeas corpus petitions by state prisoners in federal courts. In Yeager the Court noted, 327 F. 2d at 318-319, that the petitioner, as well as his co-defendant, had confessed, and that the petitioner's own confession contained substantially the same information as the co-defendant's confession. "In these circumstances, we think it is not reasonable to believe that the jury would, or, indeed, had any occasion to go beyond [petitioner's] own [confession] and use similar statements in [the co-defendant's] confession against [petitioner]."

which it does not, it is inconsistent with Jackson v. Denno, decided in 1964. As we have noted (appellant's brief, pp. 43-45), Jackson v. Denno overrules Delli Paoli v. United States, and establishes that a defendant is denied due process if his co-defendant's admissible confession, to say nothing of his co-defendant's inadmissible confession, linking the defendant to the crime, is introduced at their joint trial. \*/ The government's attempt at n. 16 of its brief to

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\*/ The commentary on Jackson v. Denno in the November 1964 issue of the Harvard Law Review, 78 Har. L. Rev. at 213, supports this assertion:

"Since the unconstitutionality of the New York procedure results in part from a judgment by the Court that the jury might be unable to disregard a confession even though found to be involuntary, <sup>23</sup> Jackson may call into question other procedures under which juries are required to perform similar tasks. Mr. Justice Harlan mentioned three such procedures in his dissent, two of which may be distinguished from the practice followed in Jackson. Where the jury is asked to determine whether the defendant was sane before inquiring into his guilt, there would seem to be no denial of due process to the defendant. No prejudice results from the joining of the two inquiries, since each properly involves an investigation into the circumstances of the crime. Where the jury is asked to disregard improper remarks of counsel, there may be prejudice to the defendant, but no alternative procedure would prevent improper remarks from being made; in Jackson the alternative procedures noted above would have prevented the possibility of prejudice to the defendant. The third practice mentioned by Mr.

(cont'd)

belittle this effect of Jackson v. Denno is strained indeed. \*/  
It says it is "impossible" that Jackson v. Denno "overrules  
Delli Paoli on due process grounds . . . since the issues in-  
volved in the two cases are almost totally dissimilar." In  
fact, the issues in the two cases are the same. The issue in

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(Cont'd)

Justice Harlan, approved by the Court in Delli Paoli v. United States, <sup>24</sup> is not readily distinguishable from the procedure in Jackson. Where a confession made by one conspirator and implicating others is admitted into a joint trial of the conspirators with instructions that it may be used only against the confessor, the danger of prejudice to the nonconfessing defendants is clear, and it could be eliminated by replacing the names of the implicated codefendants with symbols or by trying the conspirators separately. Because of these close parallels between Jackson and Delli Paoli, Jackson may foreshadow a holding that the Delli Paoli procedure violates due process.<sup>25</sup>

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<sup>23</sup>/Judge Frank remarked in an analogous situation that requiring the jury to perform such a task is like telling a boy 'to stand in a corner and not think of a white elephant.' United States v. Antonelli Fireworks Co., 155 F.2d 631, 656 (2d Cir.) (dissenting opinion), cert. denied, 329 U.S. 742 (1946).

<sup>24</sup>/352 U.S. 232, 237 (1957).

<sup>25</sup>/It may be significant that the Court in Jackson quotes from Mr. Justice Frankfurter's dissent in Delli Paoli. 378 U.S. at 388, n.15.

\*/ We accept, however, the government's characterization of the kind of evidence (other people's confessions) erroneously admitted at Dykes' trial as "highly prejudicial."

both cases is whether due process permits juries to be trusted to give only limited consideration to the most potent of all evidence - confessions. The resolution of the issue in Jackson v. Denno is inconsistent with the resolution of the issue in Delli Paoli. As the government states, Justice Harlan specifically called attention to this inconsistency in his dissent in Jackson v. Denno. To us the inconsistency means that Delli Paoli is no longer good law, as the majority's citation of the dissent in Delli Paoli confirms. The government seems to concede this, or perhaps it only concedes it arguendo, but it seems also to say that Delli Paoli is not overruled on due process grounds. Such a position involves distinctions which to us appear untenable and indeed meaningless. Surely trusting the jury not to apply a defendant's confession against the co-defendant it implicates cannot be said to be any less a violation of due process than trusting the jury not to apply the defendant's confession against himself. See the quotation from the Harvard Law Review at pp. 7-8, supra.

Pages 9-12 of the government's brief contain a discussion of "general principles governing relief under 28 U.S.C. §2255," which is fully answered by the discussion at pp. 37-39

of appellant's brief. The generalizations in appellant's brief about §2255 cases in which relief was not granted apply without exception to the §2255 cases cited by the government in which relief was not granted. Some of the cases cited by the government are specifically referred to in appellant's brief. None of the cases cited by the government constitute authority for denying relief to Dykes. \*/

\*/ In Warring v. Colpoys, cited by the government (Br. 11), the defendant pleaded guilty and took no appeal. His application for habeas corpus relief was based not on any contention that his conviction was not valid, but only on the ground that the acts for which he was validly convicted had, after his conviction, ceased to be looked upon as criminal. The Court's words in Warring, quoted by the government, that "the living should not be governed by their posterity, for that . . . would be downright chaotic," are, we respectfully submit, not very meaningful. In Meyers v. United States, this Court satisfied itself that its decision affirming Meyers' conviction on direct appeal was not inconsistent with the later Supreme Court case which Meyers urged vitiated his conviction. In West v. United States, the defendant did not take a direct appeal from his conviction. And the error he alleged in the §2255 proceeding (failure of the trial judge to give a lesser included offense instruction) was of far lesser magnitude than the errors committed against Dykes.

At n.10 of its brief, the government quotes a passage from United States v. DeFillo which inveighs against defendants who "[hold] back" arguments at one stage of the prosecution in order to advance them at later stages. At 166 F. Supp. 628, the DeFillo court states: "[T]he cases upon which petitioner principally relies were all decided long before the argument of his appeal." Most of the cases upon which Dykes principally relies were decided in 1963 and 1964, after the argument and decision in his direct appeal, and earlier cases upon which he relies are primarily cited in contexts relevant only to the present appeal.

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The government says (Br. 15) that Lampe v. United States and Plummer v. United States preclude the Court from considering on this appeal matters not specifically raised in the coram nobis - §2255 proceeding below. In Lampe, this Court fully considered the matter which had not been raised in the §2255 proceeding in the District Court. Indeed, the Court also asserted that even matters not raised at trial or on direct appeal were not necessarily precluded from consideration in §2255 proceedings, citing Jordan v. United States, 352 U.S. 904 (1956), reversing 98 U.S. App. D.C. 180, 233 F. 2d 362 (1956). In Plummer, this Court invited the petitioner to present the allegation raised for the first time on the §2255 appeal to the District Court in a new §2255 petition, so that the District Court could give initial consideration to the question of whether the allegation required a hearing. Here no hearing is sought. All relevant facts are already on the record, and the issues presented by them are ripe for consideration by this Court. No purpose would be served by returning

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(Cont'd) In this connection, it is to be noted that the government suggests in n.21 of its brief that only Supreme Court cases can have retroactive effect. The government did not seek certiorari in Jones, Short and Jones or in the other recent cases in this circuit on which we rely. It cannot therefore be heard to assert in this circuit that the retroactive effect of these cases is nullified by the fact that the Supreme Court did not affirm them.

the case to the District Court. See Sanders v. United States, 373 U.S. 1 (1963).

In response to our argument that the taking of these confessions violated the right to counsel of Dykes' three co-defendants, \*/ the government says (Br. 16) that Dykes is without standing to raise the objection, \*\*/ and that "it is inconceivable that appellant was additionally prejudiced by this alleged error." (Emphasis added). Our position is that Dykes' constitutional rights were violated by the admission at his trial of Coleman's and Tatum's inadmissible confessions, which accused him, whether the basis of inadmissibility was right to counsel or Mallory or both. Further, Jackson's

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\*/ The government does not deny the right to counsel violation. It says only that "it is by no means clear" that it occurred.  
\*\*/ For this proposition, the government, rather more candidly than it no doubt intended, quotes from Sachs v. Canal Zone, as follows: "It was never heard that a defendant could object to the violation of the privileges of others not claimed by them because that violation discovers evidence by which he is convicted." (Emphasis added). It is precisely Dykes' contention that he was convicted by evidence, i.e., his co-defendants' confessions, discovered and used in violation of his co-defendants', as well as his own, rights.

confession - which was not taken contrary to Mallory, at least according to the law as it stood at the time of the trial and direct appeal, — was also inadmissible, on right to counsel grounds, and Dykes' constitutional rights were violated by its admission as well. And even if Jackson's confession was not inadmissible as to Jackson, the overruling of Delli Paoli v. United States in Jackson v. Denno establishes that its admission at Dykes' trial violated Dykes' constitutional rights.

The government says (Br. 17): "We agree that the procedure followed by the trial court in resolving the issue of the voluntariness of the confessions was unconstitutional under Jackson v. Denno." And it adds: "Moreover, the rule has been applied retroactively in a collateral proceeding," citing McNerlin v. Denno. But the government says that Dykes' assertion that this constitutional violation prejudiced him is an "egregious non sequitur." The fact is, however, that there is the closest possible connection between the admitted constitutional error of the trial judge and Dykes' case. For until an appropriate judicial proceeding shows otherwise, the assumption must be that none of the three confessions would have

been put before the jury at all had the trial judge followed the proper, constitutional, procedure, and had himself made a preliminary independent determination as to whether or not the confessions were voluntary. If it were proper to make the contrary assumption, the Supreme Court would not have ordered a hearing in Jackson v. Denno in which the trial judge was to make an independent determination, if he could, as to whether or not the confession was voluntary. If he could not make such a determination, or if he determined the confession was involuntary, there was to be a new trial. Thus, it is completely accurate to say, on Jackson v. Denno grounds, as well as on Mallory and right to counsel grounds, that the confessions of Coleman, Tatum and Jackson were erroneously put before the jury. Had they not been put before the jury, the government's case against Dykes would have virtually collapsed.

The government disputes (Br. 17-18) our contention (appellant's brief, pp. 33-34, 47-49) that portions of the trial judge's instructions to the jury were erroneous:

A. The government says that in full context, the instructions did not tell the jury that the inadmissibility of involuntary

confessions was based solely on their untrustworthiness. The issue can only be resolved by resort to the transcript. (Tr. 1992-1994). We note, however, that the passage from the instructions quoted by the government commences with the word "consequently," and that the transcript shows that the word "consequently" refers directly to the discussion of untrustworthiness that preceded the passage quoted by the government.\*/

B. The issue as to whether or not the trial judge took from the jury the question as to whether or not the co-defendants made the confessions they were alleged to have made can also only

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\*/ As for the government's contention that "it is too late" to raise this point since it could have been raised at trial or on direct appeal, we refer the Court to the discussion in appellant's brief at pp. 47-49, as well as to Judge Fahy's words quoted herein at pp. 5-6. We add that the Supreme Court granted certiorari in Stevenson v. Boles, cited at pp. 48-49 of appellant's brief, and modified the 4th Circuit's judgment on November 16, 1964. 33 U.S. Law Week 3181. The Supreme Court mentioned but did not discuss the Court of Appeals' holding that failure to instruct on voluntariness is cognizable on habeas corpus despite the lack of objection in the trial court. The Supreme Court's decision in Boles is further evidence, if any were needed, that Jackson v. Denno is retro-active.

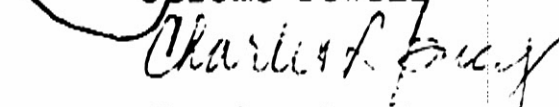
be resolved by resort to the transcript. See the transcript references cited at p. 8 of appellant's brief, as well as the discussion at pp. 33-34 and 47-49 of that brief, and the transcript references and discussion at p. 18 of the government's brief. It is to be noted that the trial judge, whom the government as well as appellant quotes, told the jury that the defendants "made and signed" the confessions, and that the government only asserts that the defendants testified that they "signed" the confessions. Our contention on this point is, contrary to the government's claim, neither "frivolous" nor "obviously manufactured."

Finally, we submit that the Supreme Court and this Court in United States v. Morgan and Thomas v. United States took a far broader view of the coram nobis remedy than the government takes. (Appellant's brief, pp. 50-55). And we reiterate that this case presents extraordinary circumstances that would make it most appropriate for the Court to exercise its power, which the government does not dispute it has, to withdraw the mandate affirming Dykes' conviction and grant him a new

trial. (Appellant's brief, pp. 56-60).

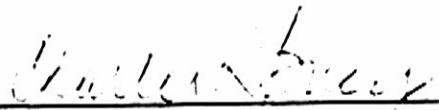
Respectfully submitted,

  
Jerome Powell

  
Charles L. Bucy  
Attorneys for Appellant  
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of  
January, 1965, personally served a copy of the foregoing  
Reply Brief for Appellant upon the United States Attorney,  
United States Courthouse, Washington 1, D. C.

  
\_\_\_\_\_  
Charles L. Bucy

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,861

JAMES M. DYKES,  
Appellant

v.

UNITED STATES OF AMERICA,  
Appellee

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APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

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PETITION FOR REHEARING EN BANC

Appellant, by his attorneys appointed by this Court, respectfully requests that this case be reheard by the full Court. As the record shows and recent cases in the Supreme Court and this Court make indisputably clear, appellant did not have a fair trial. We respectfully submit that the panel majority, which affirmed the judgment of the District Court without opinion,

United States Court of Appeals  
for the District of Columbia Circuit

FILED MAR 12 1965

*Nathan J. Paulson*  
CLERK

erred in not granting relief to appellant, and that the case is of such importance to the administration of justice in this circuit that the full Court should reconsider the panel's decision. The briefs and the dissent justify these statements in detail. We think it appropriate, however, to add the following summary and comment.

Appellant Dykes was tried jointly with Coleman, Tatum, and Jackson for murder, robbery, and unauthorized use of a vehicle. Confessions alleged to have been taken from Coleman, Tatum, and Jackson were admitted into evidence at the joint trial. All the confessions accused Dykes, who made no confession, of participation in the crimes. Coleman's confessions named Dykes 46 times. Tatum's confessions named Dykes 38 times. Jackson's confessions named Dykes 46 times. All the confessions referred to Dykes repeatedly by pronouns. Trial transcript 1455 - 1457, 1482 - 1484, 1529 - 1531, 1539 - 1541, 1545 - 1548, 1583 - 1609; principal brief pp. 6 - 7, 22; reply brief p. 5. Dykes' name was not deleted from the confessions when they were presented to the jury. The jury convicted Dykes, Coleman, Tatum, and Jackson of all the crimes charged. Dykes, Coleman, and Tatum received sentences of

13 to 39 years. Jackson received a sentence of 15 to 45 years. \*/ All four appealed. Dykes' and Jackson's convictions were affirmed by this Court. Coleman's and Tatum's convictions were reversed because their alleged confessions were taken contrary to the Mallory Rule and so were inadmissible against them. \*\*/ Upon remand of their cases to the District Court, the murder and robbery charges against Coleman and Tatum were dropped by the government, clearly for the reason that without the inadmissible confessions it had no case. Coleman and Tatum pled guilty to unauthorized use of a vehicle and were sentenced to eight months to two years in prison, which sentences they have served. In the present proceeding, Dykes seeks collateral relief from his conviction, or reconsideration by the Court of its judgment affirming his conviction.

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\*/ The evidence against Jackson showed that he had a gun and fired the shot that resulted in the homicide.

\*\*/ Dykes v. United States, 114 U.S. App. D.C. 189, 313 F.2d 580 (1962), cert. denied, 374 U.S. 837 (1963); Jackson v. United States, 114 U.S. App. D.C. 181, 313 F.2d 572 (1962); Coleman v. United States, 114 U.S. App. D.C. 185, 313 F.2d 576 (1962); Tatum v. United States, 114 U.S. App. D.C. 188, 313 F.2d 579 (1962). Subsequent decisions of the Supreme Court and this Court having retroactive effect have shown that all the confessions were taken in violation of the alleged confessors' constitutional right to counsel and were unconstitutionally presented to the jury without a finding by the judge that they were voluntary. Also the judge's instructions to the jury respecting all the confessions were constitutionally improper. Principal brief pp. 28 - 49; reply brief pp. 12 - 16.

It is plain that the trial judge intended to sentence Coleman, Tatum, and Dykes equally as accomplices in the crimes. But today Dykes is serving a sentence (13 to 39 years) twenty times more severe than the sentences served by Coleman and Tatum (8 months to 2 years). In a very real sense, this has happened because the inadmissible confessions of Coleman and Tatum have been permitted to prejudice Dykes even though ultimately they were not permitted to prejudice their makers. The competent evidence against Dykes was very weak indeed. Principal brief pp. 25 - 27; reply brief p. 3. There can be no doubt that the case against Dykes was greatly bolstered by the erroneous admission at his trial of Coleman's and Tatum's confessions. \*/ Indeed, it is most improbable that Dykes would have been convicted had the confessions not been introduced at the trial.

In Jones, Short and Jones v. United States, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, \_\_\_\_\_ F.2d \_\_\_\_\_ (July 13, 1964), this Court, sitting en banc, reversed the convictions of two non-confessing defendants

\*/ It is extremely significant that Washington, a fifth co-defendant who was named only in Jackson's confessions and not in Coleman's and Tatum's confessions, was acquitted by the jury of murder and robbery and convicted by them only of unauthorized use of a vehicle. Principal brief pp. 5 - 6, 24 - 25. In his summation, Washington's counsel pointed out to the jury the omission of Washington's name from Coleman's and Tatum's confessions. Trial transcript 1923.

tried with a third defendant whose inadmissible confession implicated them. This occurred only a year and a half after this Court's decision affirming Dykes' conviction and 13 - 39 year sentence. \*/ The government concedes that Jones, Short and Jones is completely incompatible with the opinion affirming Dykes' conviction. It admits that Dykes' conviction could not stand today. Brief pp. 8 - 9. The absence of any reference to the Dykes' opinion by the en banc majority in Jones, Short and Jones, despite the minority's reliance on Dykes, shows not only that the majority recognized the incompatibility of Jones and Dykes, but also that it recognized that Dykes was erroneous. \*\*/ As we said in our principal brief pp. 42 - 43, 59, the decision affirming Dykes' conviction is sui generis. It is without ancestry or progeny. It is apparently the only federal case in which a defendant who was

\*/ See also note at p. 49 of principal brief.

\*\*/ In Dykes, this Court cited (cf.) Malinski v. New York, 324 U.S. 401 (1945) (state prosecution, non-confessing co-defendant's conviction affirmed by Supreme Court, state orders new trial) and distinguished Anderson v. United States (federal case, non-confessing co-defendant's conviction reversed). In Jones, Short and Jones, the Court cited Anderson and distinguished Malinski. See note at pp. 42 - 43 of principal brief.

implicated by his co-defendant's inadmissible confession has had his conviction affirmed. Jones, Short and Jones gave firm expression to what, except for Dykes, had always been the law. The very essence of that important case is a nullification of the Dykes opinion. In view of all these legal and factual circumstances, it would be most appropriate for, and indeed fairness requires that, the full Court recall the judgment affirming Dykes' conviction and reconsider his case in light of its en banc decision in Jones, Short and Jones. Byrd v. United States (No. 12843, March 31, 1959); principal brief pp. 56 - 60. \*/

Dykes' appeal is not alone to the discretion of the Court. We respectfully submit, as an alternative to our request that the Court recall and reconsider the judgment affirming Dykes' conviction, that Dykes is entitled to relief under 28 U.S.C. §2255. Principal brief pp. 36 - 49; reply brief pp. 2 - 16. We think it is specious to argue, as the government does, that although concededly Dykes' trial was unfair, it was not so unfair as to deprive

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\*/The Court of Appeals of New York is another court which, like this Court, has made use of its power to recall its judgments in order to do justice. Principal brief pp. 59 - 60. It is to be noted that the panel majority herein did not rule on appellant's motion, made in his principal brief at page 60, to recall the judgment of affirmance and to reverse the judgment of conviction.

him of due process and thus to entitle him to Section 2255 relief. We do not see how it can be said that the admission of the co-defendants' confessions at Dykes' trial, which accused Dykes again and again of the crimes charged, was anything less than fundamentally unfair to him. Jones, Short and Jones and Jackson v. Denno, 378 U.S. 368 (1964), affirmed what a reading of the record makes abundantly plain, that the admission of the confessions denied Dykes due process. Had the trial judge not instructed the jury that confessions are only evidence against the confessor, there would be no dispute that due process had been denied. \*/ Jackson v. Denno and Jones, Short and Jones, recognizing the overwhelming effect of confessions on the minds of jurors, stripped away all pretense that a judge's words to the jury can make fair what is so plainly and deeply and incurably unfair. Thus, having been denied due process, Dykes is entitled under Section 2255 to vacation of his sentence and a new trial.

The panel majority did not rule on the Section 2255 question. Its order only affirmed the judgment of the District

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\*/ It is to be noted that limiting instructions were not given as to all the confessions. Principal brief pp. 6 - 7.

Court. \*/ That judgment was limited to an order denying Dykes' motion for a writ of error coram nobis. The District Court refused to consider the coram nobis motion in the alternative as a Section 2255 motion, which counsel requested that he do at the argument on the coram nobis motion. \*\*/ Since the panel has merely affirmed the limited judgment of the District Court and since the District Court did not pass upon Dykes' application for Section 2255 relief on the merits, the Section 2255 question remains open for presentation anew to the District Court. But we submit that the Section 2255 issue is ripe for decision in this Court now. Principal brief pp. 36 - 37; reply brief pp. 11 - 12. No District Court hearing is sought or needed, and plainly the issue can only be resolved in this Court. It would place a severe and unnecessary burden on appellant to require him to return to the District Court. Thus, if the Court determines not to recall and reconsider its judgment affirming Dykes' conviction, we respectfully submit that the Section 2255 issue should

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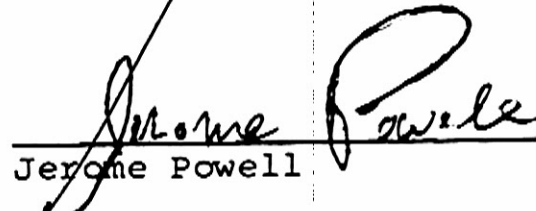
\*/ Erroneously, we submit. Principal brief pp. 52 - 55.

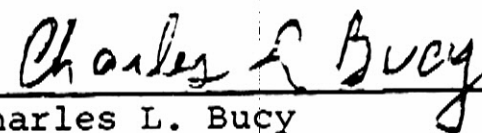
\*\*/ Transcript of proceedings of July 24, 1964, in the District Court, Criminal No. 125-61, pp. 8 - 9, 16 - 17. The Section 2255 motion was based on Jones, Short and Jones, which was decided after the coram nobis motion was filed but before it was heard and decided.

be decided by the full Court now and that it should be decided in Dykes' favor.

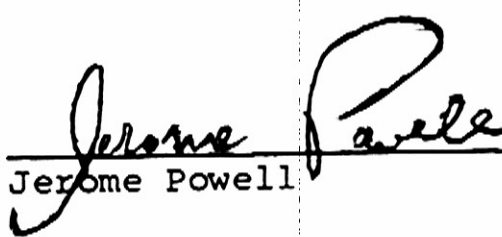
WHEREFORE, it is respectfully requested that the Court rehear this case en banc.

Respectfully submitted,

  
Jerome Powell

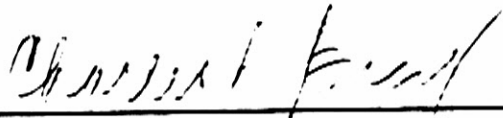
  
Charles L. Bucy  
Attorneys for Appellant  
(Appointed by this Court)

I certify that this petition is presented in good faith, and not for delay.

  
Jerome Powell

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of March, 1965, personally served a copy of the foregoing Petition upon the United States Attorney, United States Court-house, Washington 1, D.C.

  
\_\_\_\_\_  
Charles L. Bucy

